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COMMITTEE OF THE WHOLE

SUMMARY RECORD OF THE 2nd MEETING

Held at the Headquarters of the Food and Agriculture Organization of the United Nations on Tuesday, 16 June 1998, at 3 p.m.

Chairman: Mr. P. KIRSCH (Canada)

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The meeting was called to order at 3.20 p.m.

ORGANIZATION OF WORK

1. **The CHAIRMAN** said that the Bureau proposed that the following working groups should be established: a Working Group on General Principles of Criminal Law, under the chairmanship of Mr. Saland (Sweden), to consider Part 3 of the draft Statute; a Working Group on Procedural Matters, under the chairmanship of Ms. Fernández de Gurmendi (Argentina), to consider Parts 5, 6 and 8; a Working Group on Penalties, under the chairmanhip of Mr. Fife (Norway), to consider Part 7; a Working Group on International Cooperation and Judicial Assistance, under the chairmanship of Mr. Mochochoko (Lesotho), to consider Part 9; and a Working Group on Enforcement, under the chairmanship of Ms. Warlow (United States of America), to consider Part 10.

2. *It was so decided.*

CONSIDERATION OF THE QUESTION CONCERNING THE FINALIZATION AND ADOPTION OF A CONVENTION ON THE ESTABLISHMENT OF AN INTERNATIONAL CRIMINAL COURT IN ACCORDANCE WITH GENERAL ASSEMBLY RESOLUTIONS 51/207 OF 17 DECEMBER 1996 AND 52/160 OF 15 DECEMBER 1997 (*continued*) (A/CONF.183/2/Add.1)

Article 26

3. **Mr. SALAND** (Sweden), Coordinator for Part 3, introducing article 26 on the age of responsibility, said that the issue was complicated by the fact that the age of responsibility varied a great deal from one country to another. Furthermore, in some countries there was a "span" in the later youth years where there was a rebuttable presumption in one direction or the other, or latitude for the courts to determine responsibility depending on maturity, insight into wrongfulness, etc. Constitutional problems also arose in some countries. From earlier discussions it appeared that it would be easier to agree on a higher age, possibly 18. An interesting suggestion had been to treat the matter not as a responsibility issue but as a jurisdictional one, leaving national legal systems intact, so to speak. It would simply be stated that the International Court would have no jurisdiction over persons under such and such an age. In order to ascertain the prevailing view of the Committee as a guide to discussion in the working group, he would suggest that delegations should merely indicate their preferences, rather than describing their countries' practices.

4. **Ms. WILMSHURST** (United Kingdom) expressed strong support for the "solution" just suggested and proposed stating simply that the Court should have no jurisdiction over persons under the age of 18 at the time of the alleged commission of a crime. That would not prejudice any country's position with regard to the age of responsibility.

5. **Ms. WONG** (New Zealand) said that it was inappropriate for the Court to have jurisdiction over minors, which would require provision for a separate juvenile justice system under the Statute. Supporting the United Kingdom proposal, she stressed that it would not mean that the crimes committed by children would go unpunished or become legalized, but would simply leave national systems intact and enable the limited resources of the Court to be directed towards those who were not minors.

6. **Mr. SADI** (Jordan) said that the Convention on the Rights of the Child stipulated that children were to be accorded a separate judicial system but did not discuss criminal responsibility. Given the number of people

under 18 being recruited or forced into military service in many countries and the mass murders being committed by them, saying that they were not accountable could open the door to abuse.

7. **Mr. CORTHOUT** (Belgium), supporting the proposal that the Court should not have jurisdiction over persons under the age of 18, said that the Court's jurisdiction must be confined to the most essential and important crimes, which would probably not be committed by children.

8. **Mr. VERGNE SABOIA** (Brazil) said that, in view of Brazilian legislation and the provisions of the Convention on the Rights of the Child, his delegation was in favour of establishing 18 as the minimum age for responsibility, and of excluding jurisdiction for persons under that age.

9. **Mr. SLADE** (Samoa) said that the type of provision proposed by the United Kingdom was one which Samoa had consistently supported. His delegation did not think that the Court would be equipped to deal with children.

10. **Mr. POLITI** (Italy) said that his delegation had noted the increasing support in the Preparatory Committee for setting the age of criminal responsibility at 18 years, and favoured that approach for reasons of consistency not only with the principles enshrined in the Convention on the Rights of the Child but also with the essentially punitive rather than rehabilitative function of the Court. The proposal to resolve the problem by treating it as a jurisdictional matter warranted consideration. He drew attention in that connection to footnote 3 to article 75 of the draft Statute (A/CONF.183/2/Add.1).

11. **Ms. ASSUNÇÃO** (Portugal), endorsing the comments of the representatives of the United Kingdom, New Zealand, Brazil and Italy, said that in the light of the Beijing Rules and other international instruments, persons under the age of 18 should be excluded from the jurisdiction of the Court.

12. **Ms. GARTNER** (Austria) said that her delegation had difficulties with the concept of 18 years as the age of responsibility, and that treatment of the issue as a jurisdictional matter did not help much. Many of the crimes in question were committed by persons under the age of 18. Her delegation would favour establishing the age of criminal responsibility at 16, with a rebuttable presumption as to the maturity of those concerned for persons between 16 and 18.

13. **Ms. FLORES** (Mexico) considered that the right age for criminal responsibility was 18, and supported the proposal to state simply that the Court would have no jurisdiction over minors under that age. A clause could be added to make clear that that was without prejudice to domestic legislation.

14. **Mr. HARRIS** (United States of America) shared Austria's concern about excluding younger offenders from the jurisdiction of the Court because of recent experience showing to what extent young people were involved in committing the serious crimes covered by the Statute. From a practical point of view, the Prosecutor would in many cases have to prosecute lower-level persons in order to obtain their cooperation in seeking out those who had directed and orchestrated the atrocities, and that might prove very difficult if persons under the age of 18 were being categorically excluded from prosecution by the Court. Should there be no consensus on the type of provision proposed by Austria, however, and in view of the time constraints, his delegation could accept a provision along the lines of that proposed by the United Kingdom, but would not wish to see the age of responsibility set any higher than 18.

15. **Mr. PEREZ OTERMIN** (Uruguay) said that his delegation considered 18 years to be the right age for criminal responsibility. Although the criminal activities of minors under that age had risen very considerably, he

agreed with the representative of New Zealand that that should not fall within the jurisdiction of the Court but should be left to national jurisdiction and legislation.

16. **Mr. GUARIGLIA** (Argentina) agreed that the Court should not have jurisdiction over minors under 18 years of age. The exclusion of persons under the age of 18 from the Court's jurisdiction would be a practical way of resolving the difficulties that had arisen in the Preparatory Committee, and the age of 18 did have some international status since it was the age ceiling specified in article 1 of the Convention on the Rights of the Child. It would be difficult to reach agreement on a lower limit.

17. **Mr. AGIUS** (Malta) agreed with previous speakers that 18 should be considered the age of criminal responsibility and that minors under that age should be excluded from the jurisdiction of the International Criminal Court.

18. **Ms. FRANKOWSKA** (Poland) said that her delegation joined others in endorsing the United Kingdom's statement, favouring the proposal to treat the issue as a jurisdictional one and considering that 18 would be the right age.

19. **Mr. STROHMEYER** (Germany) endorsed the views expressed by the delegations of the United Kingdom, New Zealand and Argentina. The Court's purpose was to try the main perpetrators and instigators of crimes, and it was not fully equipped to deal with juvenile offenders. He agreed that the relevant age should be 18 years.

20. **Mr. STIGEN** (Norway) said that his delegation supported the proposal put forward by the United Kingdom.

21. **Mr. KELLMAN** (El Salvador), supported the United Kingdom delegation's statement. The Court should have no jurisdiction over minors under 18 years of age and should leave national law to deal with any children who committed crimes of the kind in question.

22. **Mr. KOFFI** (Côte d'Ivoire) expressed his preference for an age "span". He was well aware that children—some very young—were sometimes used for activities of the kind covered by the Statute, but the primary responsibility then lay with the adults who made use of those children. While he noted with interest the possibilities mentioned by the representative of Sweden, he would favour the text contained in proposal 2 under article 26 of the draft (A/CONF.183/2/Add.1).

23. **Mr. AL-CHEIKH** (Syrian Arab Republic) said that his delegation considered that 18 was the right age for criminal responsibility. National legal systems varied in regard to the minimum age of responsibility and penalties for juveniles according to their age. Since international instruments such as the Convention on the Rights of the Child and the Beijing Rules laid down special provisions for minors, the Court should have no jurisdiction over such persons. The Prosecutor would then not need to prove that persons under 18 were aware of the implications of their acts.

24. **Mr. IMBIKI** (Madagascar) thought that 18 years should be the age of criminal responsibility, meaning absolute responsibility. However, between the ages of 16 and 18 a perpetrator could be considered as having either "absolute" irresponsibility (and hence not being liable for prosecution) or "relative" irresponsibility, meaning that it was for the Prosecutor to assess whether the alleged perpetrator was able to understand the implications of the crime committed and therefore liable to prosecution.

25. **Ms. SUCHAR** (Israel) said that a distinction needed to be drawn between responsibility and sentencing. Young people aged 16 were well aware of the wrongfulness of the kinds of crime in question, and the age of responsibility should therefore be 16 so that adults could not take advantage of them and use them to commit such crimes. However, young people between the ages of 16 and 18 should be subject to more lenient penalties than those imposed on adults.

26. **Mr. AL ANSARI** (Kuwait) suggested that a comparative table showing the age of responsibility in different States should be produced to give delegations a clearer idea of the situation in different countries. With reference to paragraph 1 under proposal 1, the final clause in square brackets concerning proof that the person knew the "wrongfulness" of his or her conduct was imprecise and would be best deleted.

27. **Mr. KERMA** (Algeria) said that the age of criminal responsibility in his country was 18 and his delegation therefore supported the idea that the Court should not have jurisdiction over persons under that age.

28. **Mr. NIYOMRERKS** (Thailand) said that his delegation considered that maturity could vary from one person to another, and that whoever committed a serious crime under the jurisdiction of the Court should be convicted and sentenced, with special consideration and mitigation being accorded in the case of a minor. In the interests of avoiding controversy and saving time, however, it would accept the proposal that the Court should not have jurisdiction over minors under 18 years of age.

29. **Mr. ONWONGA** (Kenya) said that there seemed to be an emerging consensus that 18 years should be the age fixed, a position he supported because persons below that age might not be acting with full intent and might be under the influence of others, who should be held responsible.

30. **Mr. Tae-hyun CHOI** (Republic of Korea) thought that the age of criminal responsibility should be 18. However, some procedure was needed in the case of crimes committed by minors under the age of 18, different from the procedures applied to adult criminals. The Israeli delegation had rightly drawn attention to that issue. The Court could hardly deal with all child criminals, but a solution might lie in giving the Prosecutor discretion.

31. **Mr. SHARIAT BAGHERI** (Islamic Republic of Iran) said that his delegation was in favour of establishing the age of 18 as the age of criminal responsibility, but suggested that, in exceptional circumstances, the Court should be competent to punish persons aged between 15 and 18 who were aware that their behaviour was wrongful. The lower limit should not, however, be below 15 years of age.

32. **Mr. KROKHMAL** (Ukraine) expressed support for the United Kingdom proposal. Treating the matter as a jurisdictional one would be an elegant solution to the problem. However, the relevant provision could perhaps be placed in Part 2 of the Statute, concerning jurisdiction.

33. **Mr. KAMBOVSKI** (The former Yugoslav Republic of Macedonia) fully supported the principle of excluding persons under the age of 18 from the jurisdiction of the Court, in view of the differences between legal systems and the need, if the Court's jurisdiction over minors was accepted, to include many special substantive and procedural provisions in the Statute, in accordance with the Convention on the Rights of the Child and other international instruments.

34. **Mr. RODRIGUEZ CEDEÑO** (Venezuela) said that the exclusion of minors under 18 years of age from the jurisdiction of the Court would be the most appropriate approach. The age of 18 was consistent with the definition

in article 1 of the Convention on the Rights of the Child. Minors under 18 years of age did indeed commit serious crimes, but there were domestic courts to deal with such cases.

35. **Mr. AL-JABRY** (Oman) said that, although it was true that children were engaged in military activities and use was made of them to commit war crimes, it was those who had command over them who should be responsible for such acts. His own country's legislation had special provisions applicable to juvenile offenders. His delegation considered that the age for criminal responsibility should be 18.

36. **Mr. PIRAGOFF** (Canada) said that the proposal of the United Kingdom to treat the issue as a jurisdictional rather than as a responsibility issue would overcome the many difficulties arising out of differences between legal systems and would enable the debate to be refocused. His delegation associated itself with that proposal.

37. **Mr. HAMDAN** (Lebanon) said he shared the views of those who favoured excluding minors under the age of 18 from the Court's jurisdiction. The Court's absence of jurisdiction over minors would not affect the responsibility of juvenile offenders under national legislation. The question of responsibility was distinct from that of the jurisdiction of the Court. He agreed that it would be difficult to reach consensus on wording that would cover all cases of children under the age of 18. He stressed the need for consistency with the various international instruments.

38. **Mr. HERSI** (Djibouti) endorsed the proposal that the Court should not have jurisdiction over persons under the age of 18.

39. **Mr. SADI** (Jordan) thought that the reference to the age of responsibility in article 26 should be deleted and that the matter should be treated as a jurisdictional issue. The wording of the article should be confined to a simple statement to the effect that the Court would not have jurisdiction over a crime committed by a person under the age of 18.

40. **Mr. SKIBSTED** (Denmark) said that he agreed with the majority view that the age limit should be set at 18 years.

41. **Mr. PENKO** (Slovenia) noted that although many delegations were in favour of setting the age limit at 18, some delegations preferred a limit of 16. Taking into account draft article 9 on the acceptance of the jurisdiction of the Court, a compromise solution might be to provide for the Court to have no jurisdiction over juveniles under 16 years of age, and in article 9 allow States parties to lodge a declaration which would mean that for them the age of responsibility was 18 years.

42. **Mr. SAENZ DE TEJADA** (Guatemala) agreed that the Court should have no jurisdiction over crimes committed by minors under the age of 18, and supported the United Kingdom proposal.

43. **Mr. DIAZ PANIAGUA** (Costa Rica) said he did not think that the suggested addition to article 9 would solve the problem. Costa Rica was inclined to favour the United Kingdom proposal, leaving cases of minors under the age of 18 to domestic legal systems, but the Court should be able to intervene when such systems were ineffective.

44. **The CHAIRMAN**, summing up the debate, said that there was a wide diversity in State practice with regard to the age of criminal responsibility and in delegations' preferences regarding article 26. In view of the difficulties, there had been support for the proposal to exclude persons under 18 from the jurisdiction of the Court. Some delegations had disagreed with that idea, but the working group now had a basis for further discussion.

Article 27

45. **Mr. SALAND** (Sweden), Coordinator for Part 3, introducing article 27 ("Statute of limitations"), drew attention to the many different proposals contained in the Preparatory Committee's draft. The fundamental question, in the case of the "core" crimes, was whether a statute of limitations was to be included or not. The majority view seemed to be that there should be no statute of limitations for core crimes, though the picture was more diverse if jurisdiction were to extend to other crimes such as those known as "treaty" crimes.

46. **Mr. IMBIKI** (Madagascar) said he understood the agreed approach to be that the Court's jurisdiction should come into play only when national jurisdictions were unable or unwilling to judge cases. Practices regarding the statute of limitations varied, and in order to be able to take a decision on the question of a statute of limitations it might be necessary first to decide which matters would fall within the purview of the International Criminal Court.

47. **Ms. LE FRAPER DU HELLEN** (France) said that her delegation considered that there should be no statute of limitations for genocide and crimes against humanity, but that a limitation period—perhaps of 10 or 20 years—would be appropriate for war crimes as they were defined in the draft Statute. France had been responsible for the proposal given as proposal 4 in the draft text for article 27, but was flexible and thought that proposal 4 could perhaps be combined with proposal 1. She agreed that it was important to bear in mind the complementarity between the Court and national jurisdictions.

48. **Mr. Tae-hyun CHOI** (Republic of Korea) said that, given the grave nature of the core crimes, his delegation considered that there should be no statute of limitations, and accordingly supported proposal 2. However, a statute of limitations would be necessary for offences such as those covered by article 70.

49. **Mr. AL-CHEIKH** (Syrian Arab Republic) said that crimes against humanity, which caused lasting suffering and lingered on in the memories of succeeding generations, should not be subject to time limitation. Whether or not such crimes were covered by a statute of limitations in national legislation, the Statute of the Court should maintain the right of humanity to prosecute the perpetrators, irrespective of the principle of complementarity.

50. **Mr. YAMAGUCHI** (Japan) said that his delegation would not insist on a statute of limitations, but believed that there should be a safeguard such as that provided for in proposal 3, to protect the rights of the accused to a fair trial.

51. **Mr. MANSOUR** (Tunisia) said that the Geneva Conventions emphasized the importance and seriousness of crimes against humanity, war crimes and genocide. Such crimes should not be subject to any statute of limitations.

52. **Ms. SHAHEN** (Libyan Arab Jamahiriya) said that all the crimes which fell within the jurisdiction of the Court were serious crimes that should not be subject to a statute of limitations. Her delegation therefore favoured proposal 2. There should, however, be no confusion between crimes falling under national and international jurisdiction.

53. **Mr. VERGNE SABOIA** (Brazil) said that, although Brazilian criminal legislation provided for varying limitation periods for different crimes, Brazil could accept the proposal that there should be no statute of limitations for crimes within the inherent jurisdiction of the Court.

54. **Mr. RIORDAN** (New Zealand) said that, as had been pointed out, the crimes in question were very serious ones. Moreover, they were often committed by persons who might, for example, be State officials and therefore

have a unique capacity to suppress evidence. Since the purpose of the Court was to put an end to impunity, New Zealand considered that there should be no statute of limitations.

55. **Mr. QUIROZ PIREZ** (Cuba) said that limitation periods existed for procedural or even humanitarian reasons, but that they could not apply to the most heinous crimes. The principle of complementarity meant that, once a national court had handed down a decision against a person tried, the case could not then come to the International Criminal Court; when, however, a matter fell within the Court's jurisdiction, there could be no statute of limitations.

56. **Mr. AGIUS** (Malta) agreed that there should be no statute of limitations on the crimes within the jurisdiction of the Court, for the reasons given, in particular, by the New Zealand delegation.

57. **Mr. GUARIGLIA** (Argentina) expressed support for proposal 2. A single rule should apply to all crimes within the jurisdiction of the Court, without distinction.

58. **Mr. RODRIGUEZ CEDEÑO** (Venezuela) said that the Statute dealt with a unique category of crimes, and that there should be no statute of limitations for such crimes, regardless of any of limitation periods in domestic legislation.

59. **Mr. KAMBOWSKI** (The former Yugoslav Republic of Macedonia) said that there should be no statute of limitations on the crimes within the jurisdiction of the Court, in accordance with the United Nations Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity.

60. **Mr. AL AWADI** (United Arab Emirates) said that his delegation supported proposal 2, in view of the nature of the crimes in question. National law might provide for periods of limitation, but no limitation should apply to the International Court.

61. **Mr. AL ANSARI** (Kuwait) said that the crimes which fell within the purview of the Court constituted a threat to peace and there should be no statute of limitations for them. His delegation therefore favoured proposal 2.

62. **Mr. GOMEZ MENDEZ** (Colombia) said that his delegation supported proposal 2, because of the seriousness of the crimes in question.

63. **Ms. CONNELLY** (Ireland) said that the serious crimes under discussion did not include the offences covered by article 70. There should be no time limit on culpability in respect of the heinous crimes within the jurisdiction of the Court. Her delegation supported proposal 2. She was sympathetic to the view expressed by the representative of Japan that the accused's right to a fair trial should be safeguarded, but considered that that issue should be dealt with elsewhere than in article 27.

64. **Mr. NIYOMRERKS** (Thailand) said that his delegation also favoured proposal 2. The jurisdiction of the Court over core crimes should be universal.

65. **Mr. de KLERK** (South Africa) supported proposal 2 for the reasons given by other speakers. Swift justice was important, but that did not mean that a limitation period was justified. All States with statutes of limitations would do well to look at their statute books to avoid the danger of finding themselves without jurisdiction because of the effect of such limitations.

66. **Ms. TOMIĆ** (Slovenia) agreed that there should be no statute of limitations for the core crimes under the Court's jurisdiction, given the nature and gravity of those crimes.

67. **Ms. RAMOUTAR** (Trinidad and Tobago) said that her delegation supported proposal 2 and believed that there were sufficient safeguards within the Statute to take care of the rights of accused or suspected persons.

68. **Mr. SADI** (Jordan) supported the view that there should be no statute of limitations, but suggested that the need for speedy prosecution of persons charged with crimes should be taken into account by wording to the effect that every effort must be made to expedite the prosecution of persons charged with the commission of crimes under the Statute.

69. **Mr. ONWONGA** (Kenya) said that his delegation favoured proposal 2. As to whether an accused would have a fair trial, that would be dealt with in the first place by the Pre-Trial Chamber and then by the Prosecutor, who, at the end of his case, might ascertain whether there was evidence to proceed or not. The introduction of a statute of limitations would reward a criminal who went underground for a number of years to escape prosecution.

70. **Mr. FADL** (Sudan) expressed support for proposal 2.

71. **Mr. HU Bin** (China) said that he supported proposal 4 on the grounds that, whereas there should be no statute of limitations for crimes against humanity, genocide and the crime of aggression, war crimes were another matter; there should be a statute of limitations for violations of the laws of war.

72. **Mr. BALDE** (Guinea) said that one of the purposes of the International Criminal Court was to ensure that the most odious crimes did not go unpunished. It would be illogical to allow those who committed crimes against humanity to escape prosecution by the Court after the passage of a certain period of time. Proposal 2 was therefore the most appropriate one.

73. **Ms. FLORES** (Mexico) said that there should be no statute of limitations for such serious crimes as genocide, crimes against humanity and war crimes. There should be no distinction between war crimes and other core crimes within the jurisdiction of the Court.

74. **The CHAIRMAN**, summing up the debate, said that many delegations were opposed to a statute of limitations with respect to core crimes, although some distinguished between war crimes and other core crimes. While some delegations thought that the complementarity principle was relevant to the issue, others disagreed in view of the seriousness of the crimes in question. Related issues such as the need to ensure a speedy and fair trial had been raised, as had the point that offences under article 70 should be dealt with differently.

Articles 24 and 29

75. **The CHAIRMAN** recalled that, at the previous meeting, the Coordinator for Part 3 had proposed that articles 24 and 29 should be referred to the Drafting Committee, after a brief discussion if necessary. Could those articles now be referred to the Drafting Committee?

76. **Mr. SALAND** (Sweden), Coordinator for Part 3, said that he had proposed replacing the words "act [or omission]" in paragraph 2 (a) of article 29 by the word "conduct" and deleting paragraph 4 of that article.

77. **Ms. FLORES** (Mexico) said she thought that the question of deleting paragraph 4 of article 29 required further discussion.

78. **The CHAIRMAN** said that open questions would be referred to the working group.

79. **Mr. HARRIS** (United States of America) suggested that the Drafting Committee should consider whether the problem discussed in relation to "act or omission" in paragraph 2 (a) of article 29 also arose with regard to the term "physical elements" in paragraph 1 of that article. Secondly, the language of paragraph 2 (b) and paragraph 3 might be harmonized.

80. **The CHAIRMAN** said that those suggestions would be taken into account by the Drafting Committee.

81. **Mr. HAMDAN** (Lebanon) asked whether paragraph 4 of article 29 would go to the working group or the Drafting Committee.

82. **Ms. FLORES** (Mexico) said she took it that paragraphs 1, 2 and 3 of article 29 would go to the Drafting Committee and that the rest would be discussed in the working group.

83. **The CHAIRMAN** said that that was his understanding.

Part 1 of the draft Statute

84. **The CHAIRMAN** recalled that Part 1 had been introduced by the Coordinator of Part 1, Mr. Rama Rao (India), at the previous meeting.

85. **Mr. van der WIND** (Netherlands) confirmed his country's presentation of the candidacy of the city of The Hague as the seat of the International Criminal Court and expressed gratitude for the many expressions of support it had received, including that of its European partners. His Government reiterated its full commitment to doing everything in its power to serve as an effective host of the Court. Taking into account the support received and the fact that, to his knowledge, no other candidacies had been submitted, his delegation proposed that the candidacy of The Hague should be reflected in the text of article 3, paragraph 1, of the draft Statute.

86. **Mr. POLITI** (Italy) felt that Part 1 on the establishment of the Court could be forwarded to the Drafting Committee. Questions of substance would be resolved by the choices made under Parts 2, 11 and 12 of the draft Statute, and he stressed the importance of coordination between Part 1 and other parts. On article 2, Italy favoured an agreement between the Court and the United Nations rather than the integration of the Court into the United Nations system. The former option was consistent with provisions adopted in respect of other international jurisdictions and would better safeguard the independence of the Court. Italy also attached considerable importance to article 4, paragraph 2, on the status and legal capacity of the Court. Lastly, it thanked the Netherlands for offering The Hague as the seat of the Court.

87. **Ms. FERNANDEZ de GURMENDI** (Argentina) agreed fully with the previous statement and likewise thanked the Netherlands for its offer to host the future Court. With the appropriate addition to paragraph 1 of article 3, the whole part could be referred to the Drafting Committee.

88. **Mr. JENNINGS** (Australia) endorsed the statements made by the delegations of Italy and Argentina.

89. **Mr. AL-CHEIKH** (Syrian Arab Republic) said that his delegation also wished to see the reference to The Hague included in article 3 and the whole of Part 1 forwarded to the Drafting Committee, subject to some amendment to the wording of the first part of article 1 in the Arabic version, in which the term used for bringing persons to justice was too restrictive.

90. **Mr. GARCIA LABAJO** (Spain) agreed that Part 1 could now be referred to the Drafting Committee, but suggested the addition, at the end of the second sentence of article 1, of a reference to "other provisions" adopted in accordance with the Statute—an implicit reference to the Rules of Procedure and Evidence and the Regulations of the Court.

91. **Mr. MOCHOCHOKO** (Lesotho), welcoming the offer of the Netherlands to host the Court, agreed that Part 1 could now be forwarded to the Drafting Committee.

92. **Mr. SADI** (Jordan) suggested that the language of article 1 should be simplified and also that the words "and national" should be inserted before "concern".

93. **Mr. MANSOUR** (Tunisia) said he agreed with the delegation of the Syrian Arab Republic that the Arabic version of article 1 should be amended.

94. **Mr. CAFLISCH** (Switzerland), **Mr. EL MASRY** (Egypt) and **Ms. VEGA** (Peru) agreed that, with the inclusion of The Hague as the seat of the Court, Part 1 could be forwarded to the Drafting Committee.

95. **Ms. FLORES** (Mexico) said that some provisions called for further discussion. That morning, in connection with article 23, her delegation had proposed that article 1 should be amended to make it clear that the Court's jurisdiction extended only to individuals, or "natural persons". That article should not, therefore, be referred to the Drafting Committee until its scope had been determined. Furthermore, while she agreed that the reference to The Hague should be inserted in paragraph 1 of article 3, paragraph 3 of that article also called for further discussion, either in the Committee or in the working group.

96. **Mr. AL ANSARI** (Kuwait) agreed that the wording of the Arabic version of article 1 should be amended. He thanked the Netherlands for offering to host the Court in The Hague.

97. **Mr. SKIBSTED** (Denmark) advocated the referral of Part 1 to the Drafting Committee as it stood, and welcomed the offer by the Netherlands to host the seat of the Court.

98. **Mr. Tae-hyun CHOI** (Republic of Korea) said that there seemed to be an inconsistency between article 2, which spoke of approval by the States parties to the Statute, implying each and every State party, and article 3, paragraph 2, which spoke of approval by the Assembly of States Parties, implying a majority decision.

99. **Mr. AL AWADI** (United Arab Emirates) welcomed the offer by the Netherlands to host the seat of the Court in The Hague. Article 3, paragraph 3, should be made more explicit before being referred to the Drafting Committee. What exactly were the powers and functions which the Court might exercise on the territory of any State party?

100. **Ms. DASKALOPOULOU-LIVADA** (Greece) expressed the view that Part 1 as a whole was ready to be sent to the Drafting Committee. Her delegation would strongly oppose inserting the words "and national" in the phrase "crimes of international concern". National concerns were covered by the second part of the sentence, which

said that the Court would be complementary to national criminal jurisdictions. It was over crimes of international concern that the International Criminal Court should have jurisdiction.

101. **Ms. WILMSHURST** (United Kingdom) said that her delegation would be in favour of forwarding the whole of Part 1 to the Drafting Committee, subject to the completion of article 3, paragraph 1, as proposed. It would prefer to leave the question of a reference to individuals in article 1, as proposed by Mexico, open pending the final drafting of Part 3; that need not delay referral to the Drafting Committee. The Mexican delegation had not indicated what changes it wished in article 3, paragraph 3. In that same paragraph, the concern expressed by the United Arab Emirates might be met by inserting "in accordance with this Statute" or "under this Statute" to make it clear that the reference was to the powers given by the Statute. The point made by the Republic of Korea about the discrepancy between article 2 and article 3 was well taken. She assumed that it was the Assembly of States Parties that was intended in both cases, but perhaps the Drafting Committee might consider the matter and make an appropriate recommendation to the Committee of the Whole.

102. **Mr. MADANI** (Saudi Arabia) expressed support for establishing the seat of the Court at The Hague. With reference to article 3, paragraph 3, he agreed with the United Arab Emirates about the ambiguity of that paragraph, which should make clear how the Court might exercise its powers and functions on the territory of any State party.

103. **Mr. QUIROZ PIREZ** (Cuba) said that article 1 was closely related to the articles which defined the crimes within the jurisdiction of the Court. The phrase "the most serious crimes of international concern" would give rise to differences of interpretation, and should be amended to "the crimes laid down in the Statute" or "defined in the Statute". He also had misgivings about the vague wording of article 3, paragraph 3. The "powers and functions" and "special agreement" referred to needed to be specified.

104. **Ms. WILLSON** (United States of America) expressed support for the articles in Part 1 as currently drafted and amended to take account of the welcome offer by the Government of the Netherlands. The representative of the Republic of Korea had rightly drawn attention to a discrepancy between article 2 and article 3 which could be rectified by bringing the wording of the former into line with that of the latter. The proposal to add a reference to "other provisions" deriving from the Statutes at the end of article 1 warranted careful examination; any such additional provisions would perhaps need to be spelt out.

105. **Mr. NIYOMRERKS** (Thailand) expressed support for the establishment of the seat of the Court in The Hague.

106. **Mr. RODRIGUEZ CEDEÑO** (Venezuela) said that Mexico's request for the inclusion of a reference to individuals in article 1 was appropriate, but the matter could be left pending until the finalization of Part 3. Cuba, too, was right in stating that the crimes referred to in that article were those laid down in the Statutes and that the current wording might give rise to difficulties, but that was a drafting matter, as was the reference to States parties in articles 2 and 3. Article 3, paragraph 1, should be completed by the reference to The Hague, Netherlands, and note should be taken of the proposal by Spain to add a reference to provisions deriving from the Statutes at the end of article 1. Subject to those drafting points, Part 1 was ready for referral to the Drafting Committee, with the exception of article 3, paragraph 3, on which Mexico had expressed concerns and the United Kingdom had made a proposal.

107. **Mr. AL-CHEIKH** (Syrian Arab Republic) said he shared the concerns of the United Arab Emirates about article 3, paragraph 3. The title of the article was "Seat of the Court": if what was meant by paragraph 3 was that the Court could hold sessions in a State party, that should be spelt out, but if it was a question of exercising powers

and functions in general, they should be specified and included in the appropriate part of the Statute. Article 1 was unduly wordy, and unnecessarily restated what was already in the preamble. It would suffice to say that the Court had the power to bring persons to justice for crimes committed under the Statute.

108. **Mr. DRONOV** (Russian Federation) endorsed the proposed addition to article 3, paragraph 1, to reflect the generous offer of the Netherlands to host the Court. Only minor problems remained to be settled in respect of Part 1, which could soon be referred to the Drafting Committee. Article 1 had the merit of having been worded in such a way as to be applicable irrespective of the final decision on Part 3, but he would see no difficulty in amending it subsequently to take account of such a decision. The point made by the Republic of Korea was well taken; the reference in both cases should be to the Assembly of States Parties. Any ambiguity in the wording of article 3, paragraph 3, could be clarified by adding the words "in accordance with this Statute" after "State Party".

109. **Mr. CHERQUAOUI** (Morocco) said he shared the views of previous speakers on the need to amend the Arabic version. He would also prefer the crimes referred to in article 1 as being "of international concern" to be specified in order to avoid any misinterpretations. With regard to article 3, paragraph 3, he likewise agreed that clarification was needed as to whether the Court's exercise of its powers and functions referred to the holding of sessions in other States parties or had some other meaning.

110. **Mr. PALIHAKKARA** (Sri Lanka), while agreeing that the text of Part 1 should be sent to the Drafting Committee as soon as possible, with the relevant amendment to article 3, paragraph 1, concerning the seat of the Court, expressed support for Cuba's suggestion that the crimes mentioned in article 1 should be specified by reference to the Statute. He further supported the United Kingdom's suggestion to clarify article 3, paragraph 3, by adding "in accordance with this Statute", although that paragraph was perhaps out of place under article 3 and might be more appropriately inserted under article 4 or as a separate paragraph.

111. **Ms. WONG** (New Zealand) thought that article 2 (subject to the replacement of "States Parties" by "Assembly of States Parties"), article 3, paragraphs 1 and 2, and article 4 could be referred to the Drafting Committee, leaving only article 1 and article 3, paragraph 3, to be debated further.

112. **Ms. FRANKOWSKA** (Poland) felt that Part 1 was ready to be forwarded to the Drafting Committee. Perhaps article 3, paragraph 3, should be placed after article 4.

113. **Mr. TRAN VAN DO** (Viet Nam), endorsing the proposal to establish the seat of the Court in The Hague, said that he was in favour of leaving article 3, paragraph 3, as it stood.

114. **The CHAIRMAN**, summing up the discussion, said that, although most delegations seemed to feel that Part 1 as a whole should be referred to the Drafting Committee, that view was not shared by all delegations. There appeared to be agreement that, subject to the addition of the reference to The Hague, article 3, paragraph 1, could be referred to the Drafting Committee, as could article 4, and also article 2 and article 3, paragraph 2, in which the question raised did indeed appear to be merely a drafting matter. Positions were evidently divided on article 1 and article 3, paragraph 3, between those who considered that they were settled in substance and could be finalized by the Drafting Committee and those who felt that substantive questions remained to be resolved. He therefore suggested that interested delegations should discuss those issues informally without delay. If those contacts were successful, those matters could then also be referred to the Drafting Committee; if not, it might be necessary to refer the issues to a working group.

The meeting rose at 6.15 p.m.

The meeting was called to order at 10.25 a.m.

CONSIDERATION OF THE QUESTION CONCERNING THE FINALIZATION AND ADOPTION OF A CONVENTION ON THE ESTABLISHMENT OF AN INTERNATIONAL CRIMINAL COURT IN ACCORDANCE WITH GENERAL ASSEMBLY RESOLUTIONS 51/207 OF 17 DECEMBER 1996 AND 52/160 OF 15 DECEMBER 1997 (*continued*) (A/CONF.183/2/Add.1)

1. **The CHAIRMAN** said that more time was needed to conclude the informal consultations on certain aspects of Part 1 of the draft Statute. The Committee of the Whole would therefore begin its consideration of Part 2.

Part 2 of the draft Statute

Article 5

2. **Mr. van der WIND** (Netherlands), acting as Coordinator for Part 2, said that discussions in the past had focused on the question of the selection of the crimes to be included within the Court's jurisdiction and on their definition. A consensus had been reached on the inclusion of the crime of genocide and since there seemed to be wide support for the definition in articles 2 and 3 of the 1948 Genocide Convention, which was reproduced in the draft Statute, perhaps the Committee of the Whole need only discuss it briefly before referring it to the Drafting Committee.

3. It was still not clear whether the crime of aggression should be included. The number of States accepting inclusion had risen over the years, but much would depend on the definition and the role of the Security Council.

4. With respect to the definition of aggression, there were two precedents: the statutes of the Nuremberg and Tokyo Tribunals and General Assembly resolution 3314 (XXIV) on the definition of aggression, adopted by consensus by the Assembly.

5. On the role of the Security Council, the issue was whether the Court might consider the crime of aggression only after the Security Council had determined that a State had committed such an act and the Court would then have the duty to look into the criminal responsibility of the person who had ordered it, or whether the Court might also consider a crime of aggression without such a prior determination by the Security Council.

6. In the text of the draft Statute three options were submitted, but since in preceding discussions it had practically been agreed to drop option 1, the Committee of the Whole should now concentrate on options 2 and 3.

7. He suggested that informal consultations should be held following a brief discussion in the Committee of the Whole.

8. There seemed to be general agreement that war crimes should be included within the Court's jurisdiction. There were many precedents for the definition, ranging from the 1907 Hague Convention respecting the Laws and Customs of War on Land to the 1977 Protocols Additional to the 1949 Geneva Conventions.

9. There had been discussion of the question of what could be considered international customary law, but no general agreement had been reached on that matter.

10. The definition in the draft Statute contained four sections. Section A dealt with norms applicable to international armed conflict and referred to grave breaches of the four 1949 Geneva Conventions. The text followed that of the 1949 Conventions, and there seemed to be general agreement on its inclusion and on its wording.

11. Section B, also applicable to international armed conflict, was a collection of elements from different sources retaining the language of those sources as far as possible, with certain exceptions to meet the concerns of delegations.

12. The paragraphs for which there was only one option seemed to be generally acceptable, but there were several paragraphs with up to four or five options that would need further discussion.

13. Section C dealt with norms applicable in internal armed conflict and was based on the article 3 common to the 1949 Geneva Conventions, with almost identical wording. Most delegations were in favour of the inclusion of section C, but some States had expressed concern at its inclusion.

14. Section D, also containing norms applicable in internal armed conflict, was a collection of norms from different sources. Here too the question of its inclusion was still open: a majority was in favour of including section D in the definition of war crimes but not all States agreed with that view. If section D was included, further discussion would be needed with respect to some paragraphs, certain of which were identical, or practically so, with paragraphs in section B. The result of the discussions on section B might therefore be relevant to section D.

15. In addition to the definition, three further issues relating to the question of war crimes remained outstanding. The three options submitted under the heading "Elsewhere in the Statute" required further discussion. Secondly, discussion was needed on the drafting and scope of article Y reading: "Without prejudice to the applications of the provisions of this Statute, nothing in this part of the Statute shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law." Lastly, there remained the question of the need to elaborate "elements of crimes" and of their relationship with the Statute itself.

16. There seemed to be general agreement concerning inclusion of crimes against humanity. The definition was based on several precedents from the Nuremberg, Tokyo, Rwanda and former Yugoslavia Tribunals but it also contained some new elements. The major question to be decided in respect of the definition was whether, in the introductory part of paragraph 1, there was a need to enlarge on the definitions in the subparagraphs, and whether paragraph 2, connected with the "elements of crimes", should be included.

17. There had been proposals to include three additional crimes under the jurisdiction of the Court: crimes of terrorism, crimes against United Nations and associated personnel and crimes concerning illicit trafficking in narcotic drugs. The question of including those crimes had still to be determined, and if it was decided to include them consideration would have to be given to their definition.

18. He suggested that the discussion in the Committee of the Whole should be in three parts: crimes against humanity and if necessary the crime of genocide; the definition of war crimes; and the definition and inclusion of aggression and other crimes. As far as genocide was concerned, perhaps only a brief discussion would be necessary before the text was referred to the Drafting Committee. On crimes against humanity, further discussion was needed on the major issues, either in the Committee of the Whole or in informal discussions. The Committee of the Whole would have to discuss the definition of war crimes, focusing on the outstanding issues he had mentioned, and further informal talks would also be needed. On the question of aggression, discussion in the Committee of the

Whole and informal talks were needed. On other crimes, there was a need for a discussion in the Committee of the Whole focusing on the question of their inclusion and perhaps further informal talks.

19. **The CHAIRMAN** agreed with those suggestions and called for comments on crimes against humanity and, if required, on genocide.

20. **Mr. KAUL** (Germany) said that his delegation considered that consensus with respect to the crime of genocide had already been reached, and the Genocide Convention contained a generally acceptable definition that could be used in the Statute. The problems relating to conspiracy to commit genocide, incitement to genocide, attempt and complicity could be more adequately dealt with in Part 3 of the Statute, on "General principles of criminal law".

21. His delegation considered that crimes against humanity could be committed in times of peace as well as war and that any other proposal would be a retrogression in the development of international humanitarian law. Such crimes could be committed as part of a widespread or systematic commission of such acts. All acts currently listed in subparagraphs (a) to (j) of paragraph 1 under "Crimes against humanity" should be covered. His delegation did not, however, believe that the definitions contained in paragraph 2 should be included in the Statute itself.

22. **Mr. CHUKRI** (Syrian Arab Republic) said that his delegation had no difficulty in accepting the inclusion of the crime of genocide since the relevant text corresponded to that of the 1949 Genocide Convention to which it was a party. His delegation could also accept the inclusion of crimes against humanity in the case of international armed conflict, but not in the case of internal conflict, at least for the time being.

23. He considered that the wording "enforced disappearance of persons" in paragraph 1 (i) was unclear because it could be used in reference to liberation movements fighting for their freedom and to regain their territory.

24. **Mr. AL AWADI** (United Arab Emirates) agreed with the remarks of the representative of the Syrian Arab Republic with regard to the inclusion of the crime of genocide in the Statute and the confining of the concept of crimes against humanity to international conflicts.

25. His delegation had reservations on the wording of paragraph 1 (d), "Deportation or forcible transfer of population", which might not be in line with definitions in international instruments.

26. **Mr. Khalid Bin Ali Abdullah AL-KHALIFA** (Bahrain) said that the current wording of the definition of the crime of genocide should be retained.

27. He associated himself with the comments of the representatives of the Syrian Arab Republic and the United Arab Emirates concerning crimes against humanity.

28. **Mr. SADI** (Jordan) joined the consensus on the inclusion of genocide in the Statute. With respect to crimes against humanity, no distinction should be made between international and internal conflicts; that would introduce double standards, which his country could not accept.

29. **Mr. HAMDAN** (Lebanon) supported the definition of the crime of genocide, endorsed the points made by the representatives of the Syrian Arab Republic, Bahrain and the United Arab Emirates, and agreed with the German proposal to drop paragraph 2 defining crimes against humanity.

30. **Mr. DIVE** (Belgium) associated himself with the statement of the German representative and welcomed the text on the crime of genocide. He endorsed the point made by the representative of Jordan on the need to include internal conflicts, and agreed that paragraph 2 should be deleted.

31. **Mr. MADANI** (Saudi Arabia) endorsed the remarks of the representatives of the United Arab Emirates and the Syrian Arab Republic with respect to the crime of genocide and agreed that the provisions on crimes against humanity should not apply to internal conflicts.

32. His delegation opposed the reference to "enforced pregnancy" in paragraph (e *bis*) of section D under "War crimes" ("OPTION I"), since his country was opposed to abortion.

33. **Mr. DHANBRI** (Tunisia) agreed with the drafting of the definition of genocide.

34. His delegation interpreted crimes against humanity as taking place only in international armed conflicts; otherwise intervention by the Court would amount to interference in internal affairs contrary to the principles of the United Nations. He proposed deleting the first alternative in square brackets in paragraph 1 under "crimes against humanity" and adopting the second alternative, which was more detailed, with the word "international" added before the words "armed conflict".

35. **Mr. JANDA** (Czech Republic) endorsed the statement made by the German representative with regard to genocide.

36. As far as crimes against humanity were concerned, his delegation considered that the wording in paragraph 1 should be "widespread or systematic commission of such acts". It also considered that crimes against humanity should be punishable whether committed in peace or in war. Subparagraphs (a) to (j) should be retained and all the square brackets removed.

37. He agreed with the representative of Germany that the definitions in paragraph 2 were unnecessary.

38. **Mr. CHERQUAOUI** (Morocco) supported the statements made by the representatives of the Syrian Arab Republic and the United Arab Emirates with respect to the inclusion of genocide within the Court's jurisdiction.

39. His delegation considered that crimes against humanity should be considered only in the context of international conflict.

40. **Mr. AGIUS** (Malta) endorsed the positions of the representatives of Germany and Jordan with respect both to genocide and to crimes against humanity. He drew attention to Security Council resolution 808 (1993) establishing the International Criminal Tribunal for the Former Yugoslavia. It was clear that crimes against humanity directed against a civilian population were contrary to international law regardless of whether they were committed in an international or internal armed conflict.

41. **Mr. KERMA** (Algeria) said that his delegation was in favour of including the crime of genocide within the Court's remit. Like the Non-Aligned Movement, his delegation also endorsed the idea of including the crime of aggression. The definition in General Assembly resolution 3314 (XXIV) was relevant in that regard.

42. He endorsed the position of the representatives of Tunisia and the Syrian Arab Republic with respect to crimes against humanity.

43. As far as other crimes were concerned, his delegation was in favour of including terrorism and illicit drug trafficking.

44. **Mr. RAMA RAO** (India) agreed that the crime of genocide should be included. Discussion on the list of punishable acts should be deferred until the Working Group on General Principles of Criminal Law (Part 3 of the Statute) had reported.

45. On crimes against humanity, his delegation considered that the items listed in paragraph 1 (a) to (j) would be meaningless unless a *chapeau* to paragraph 1 were included, as otherwise an individual murder, for instance, would fall within the jurisdiction of the Court, and that was clearly not the intention. His delegation's preference was for "widespread and systematic" rather than "widespread or systematic".

46. As far as the words "in armed conflict" were concerned, his delegation considered that if no distinction were made between internal and international conflict, the Committee would have to consider whether the use of obnoxious weapons listed under war crimes should not also be included in crimes against humanity.

47. His delegation was not in favour of including enforced disappearance of persons in the list of crimes against humanity.

48. He agreed with the representative of Germany that paragraph 2 should be left out of the Statute.

49. **Mr. VERGNE SABOIA** (Brazil) said his delegation agreed to the inclusion of the crime of genocide and to the definition in the draft. With regard to the text within square brackets following the definition, his delegation shared the view that the references to "conspiracy" and the like should be in another part of the draft Statute.

50. His delegation also agreed with the inclusion of crimes against humanity and considered that the *chapeau* of paragraph 1 in that section was acceptable. His delegation was in favour of the formulation "as part of a widespread or systematic attack ...".

51. His delegation could agree to defining crimes against humanity irrespective of the existence of unarmed conflict. It could also accept the list of crimes in paragraph 1 (a) to (j), but would prefer a drafting more closely related to that of existing international instruments.

52. **Mr. DIAZ PANIAGUA** (Costa Rica) said that his delegation did not agree with the representative of India that enforced disappearance of persons should be dropped from the list of crimes against humanity. In view of Latin America's unfortunate experience, it must be included.

53. With regard to the *chapeau* of paragraph 1, he agreed with the remarks of the Czech representative and could accept the other proposals made. No distinction should be made with regard to the character of the armed conflict in which acts constituting crimes against humanity were committed.

54. **Mr. SKIBSTED** (Denmark) endorsed the statement made by the German representative and said that he could accept the definition of the crime of genocide as contained in the draft Statute.

55. As far as crimes against humanity were concerned, his delegation believed that the definition in the Statute should cover acts committed as part of a widespread or systematic commission of such acts against any population, whether committed in peacetime or in international or internal armed conflict.

56. As to the specific acts to be listed, his delegation favoured those enumerated in paragraph 1 (a) to (j).

57. **Mr. MOCHOCHOKO** (Lesotho) also endorsed the comments of the representative of Germany. The crime of genocide should be included and defined as in the draft Statute.

58. His delegation also supported the inclusion of crimes against humanity, and would prefer a definition consistent with existing international law requiring that the commission of acts constituting such crimes must be widespread or systematic, and committed in peace or during international or internal armed conflict. He endorsed the proposal to delete paragraph 2 under "Crimes against humanity".

59. **Ms. DASKALOPOULOU-LIVADA** (Greece) considered that the definition of genocide posed no real problems and could be sent to the Drafting Committee.

60. As far as crimes against humanity were concerned, her delegation favoured the first alternative in the *chapeau* of paragraph 1 as being less restrictive than the second.

61. Her delegation would prefer the formulation "or" to "and".

62. It was in favour of retaining all the crimes at present listed.

63. It had no strong feelings concerning the definitions and could accept the proposal to drop paragraph 2.

64. **Mr. NYASULU** (Malawi) agreed that the question of the crime of genocide could be referred to the Drafting Committee.

65. With respect to crimes against humanity, his delegation had a slight problem with paragraph 1 (h), which contained items which could have been dealt with separately. Nevertheless, it could accept the text as it stood.

66. In the *chapeau*, his delegation preferred "or" to "and". It did not support the inclusion of the word "international".

67. **Mr. FADL** (Sudan) agreed that the crime of genocide should be included in the Statute.

68. His delegation considered that crimes against humanity should refer only to international, not to internal conflicts.

69. He agreed with the Coordinator that the crime of aggression required further discussion.

70. **Mr. AL ANSARI** (Kuwait), recalling that some countries had used human beings as shields, proposed that such acts should be listed as a crime against humanity, unless paragraph 1 (e) covered the case.

71. He wondered whether paragraph 2 (a) covered acts such as the total elimination of a people's identity. If not, the Committee of the Whole should add the words "or to eliminate their identity" to paragraph 2 (a).

72. **Mr. LI Yanduan** (China) felt that the text on genocide should now be sent to the Drafting Committee.

73. He agreed with the inclusion of crimes against humanity, but wished to point out that there was no international convention as such on the subject.

74. His delegation considered that the *chapeau* of paragraph 1 should include the words "armed conflict", taking into account the Charter of the Nuremberg Tribunal, the Statute of the International Tribunal for the Former Yugoslavia and the Statute of the Rwanda Tribunal.

75. His delegation agreed with the inclusion of the crimes listed in paragraph 1 (a) to (j) but had some reservations concerning (e). It would be inclined to accept the word "imprisonment", but remained open-minded and ready to hear other views.

76. **Mr. Tae-hyun CHOI** (Republic of Korea) agreed that the definition of genocide could now be referred to the Drafting Committee.

77. His delegation believed that the concept of crimes against humanity needed a threshold, as in the wording in the first set of square brackets in the *chapeau* of paragraph 1. It was not appropriate to limit consideration of crimes against humanity to those committed in armed conflict or on a massive scale, as that would too narrowly limit the Court's jurisdiction. Moreover, the reference to "civilian" population was confusing. His delegation would prefer the word "or" to "and".

78. In paragraph 1 (e) his delegation would prefer the wording "detention or imprisonment in flagrant violation of international law", and would favour deleting paragraph 2.

79. He did not agree that crimes against humanity should be recognized as such only in international conflicts: such crimes deserved the same degree of repudiation when committed in internal conflicts.

80. **Ms. FRANKOWSKA** (Poland) agreed that the definition of genocide could now be sent to the Drafting Committee.

81. She agreed that crimes against humanity could be committed in times of peace, and the definition should apply to internal as well as international conflicts.

82. Her delegation considered that paragraph 1 under "Crimes against humanity" should read: "For the purpose of the present Statute, a crime against humanity means any of the following acts when committed as part of a widespread or systematic commission of such acts against any population."

83. It agreed that paragraph 2 should be deleted.

84. **Ms. CHATOOR** (Trinidad and Tobago) supported the inclusion of genocide and crimes against humanity within the jurisdiction of the Court. She also endorsed the remarks of the representative of Germany. Account must be taken of the recent confirmation by the Tribunal for the Former Yugoslavia that crimes against humanity could be committed in the context of any armed conflict, whether international or internal.

85. **Mr. ABDELLA AL HAMEDI** (Iraq) said that his delegation had no problem with including the crime of genocide within the Court's jurisdiction.

86. He agreed that the commission of crimes against humanity should be limited to international armed conflict and agreed with the representative of the Syrian Arab Republic that paragraph 1 (i) under "Crimes against humanity" was ambiguous.

87. **Ms. STEAINS** (Australia) expressed her delegation's concern at the argument that a connection with an international armed conflict was required for a crime against humanity. The horrific killings in Cambodia in the 1970s showed that the most heinous crimes against humanity could be committed outside the context of armed conflict, whether internal or international in nature. Her delegation strongly supported those who had argued that there was no requirement for a nexus with armed conflict in the definition of crimes against humanity.

88. With regard to the *chapeau* of paragraph 1, her delegation was in favour of the formulation "widespread or systematic commission of such acts" and the inclusion of all the elements set out in paragraph 1 (a) to (j).

89. **Ms. WILMSHURST** (United Kingdom) said that she, too, was concerned at the insistence of some delegations that there should be a nexus between crimes against humanity and armed conflict, indeed international armed conflict. In international customary law, no such nexus existed. Although, both the Charter of the Nuremberg Tribunal and the Statute of the Tribunal for the Former Yugoslavia referred to armed conflict, in both those cases the instruments had been set up after the event and neither indicated that a nexus existed in international law. Moreover, there was no such nexus in the Statute of the Rwanda Tribunal. Had there been, it was questionable whether the Tribunal would have had jurisdiction over the horrific killings that had taken place in that country. Her delegation therefore strongly supported the removal of any reference to armed conflict in the *chapeau* to paragraph 1 in the section on crimes against humanity.

90. The reference in the *chapeau* to widespread and systematic commission of the acts concerned was extremely important. As the representative of India had pointed out, the aim was to distinguish individual acts of murder from the kinds of act referred to. Her delegation therefore supported the reference to widespread and systematic commission of the acts listed. She pointed out that the article did not cover terrorist offences.

91. Her delegation endorsed the list of crimes set out in paragraph 1 (a) to (j) but was puzzled by the wish to delete paragraph 2, since some of the definitions in that paragraph might assist the Committee to agree on some of the items listed in paragraph 1 (a) to (j)—for instance, the enforced disappearance of persons. Although that concept was not yet accepted as a crime against humanity in existing instruments, her delegation would be happy to see it included if the definition was clear. She therefore appealed to delegations to consider whether the inclusion of paragraph 2 might not be useful.

92. **Ms. FERNANDEZ de GURMENDI** (Argentina) endorsed the point made by the representatives of Australia and the United Kingdom with regard to the lack of a nexus between crimes against humanity and armed conflict.

93. Her delegation would like to see the word "or" rather than "and" used in the *chapeau*, as otherwise the threshold would be too high for prosecution to be possible.

94. Her delegation favoured the list of crimes in paragraph 1 (a) to (j). It had no set position on the deletion or retention of paragraph 2.

95. **Ms. LE FRAPER DU HELLEN** (France) said that her delegation believed that crimes against humanity could be committed in peace as well as in war and against all populations.

96. In the *chapeau*, her delegation was in favour of the words "widespread and systematic" and the words "on political, philosophical, racial, ethnic or religious grounds or any other arbitrarily defined grounds".

97. Her delegation supported the list of crimes in paragraph 1 (a) to (j). In connection with (e), her delegation's preference was for the expression "detention or deprivation of liberty".

98. There had been some surprising hesitation by some delegations with respect to subparagraph (i). The United Nations Declaration on the Protection of All Persons from Enforced Disappearance, adopted by the General Assembly by consensus, had been used as the basis, and the term was generally accepted. The Declaration stated that enforced disappearances of persons "was of the nature of a crime against humanity". Logically, therefore, subparagraph (i) should be retained.

99. Her delegation was in favour of deleting paragraph 2 since the Statute already contained a provision on applicable law in article 20. She did not think that further discussion would allow progress to be made.

100. **Ms. CUETO** (Cuba), while agreeing that the provisions on genocide in the draft Statute were generally acceptable, thought that they could be expanded by the inclusion of social and political groupings and a reference to intentional conduct.

101. With reference to the German proposal to delete the second paragraph of the section on crimes against humanity, her delegation would prefer to await the views of the Working Group on General Principles of Criminal Law before taking a decision. Her delegation agreed that such crimes could be committed both in peace and in war and considered that it would not be prudent to have an unduly high threshold for the concept. Her delegation considered that the list of crimes in paragraph 1 (a) to (j) was not exhaustive.

102. The Statute should make a clear distinction between extermination and genocide, and the references to deportation or forcible transfer of population, detention or imprisonment, rape or other sexual abuse and persecution against any identifiable group or collectivity were not specific enough and should be expanded.

103. **Mr. SADI** (Jordan) suggested that it should be left to the Drafting Committee to find a wording for the *chapeau* of paragraph 1 by referring to relevant human rights case law.

104. While remaining open-minded, his delegation would like to see ethnic cleansing and the destruction of part of a population included in the list.

105. Regarding enforced disappearance of persons, that crime had been defined in human rights case law since the 1970s and the Drafting Committee could flesh out the description if necessary.

106. He questioned the need for a listing of the grounds for an attack in the *chapeau* of paragraph 1. What was in question was an attack on a population on any grounds. The reference to grounds should be deleted.

107. **Mr. NIYOMRERKS** (Thailand) said that his delegation agreed that the 1947 Genocide Convention provided the best definition of the crime of genocide.

108. His delegation believed that crimes against humanity should be qualified as widespread and systematically committed. That would ensure that crimes falling within the Court's jurisdiction were of a truly serious nature and differed from ordinary criminal offences. Moreover, his delegation believed that crimes against humanity could be committed both in peace and in armed conflict.

109. **Ms. TOMIČ** (Slovenia) said her delegation believed that crimes against humanity should be considered as separate from war crimes and that they could be committed in times of war or of peace. In a case before the International Tribunal for the Former Yugoslavia it had been ruled that under customary international law crimes against humanity did not require a connection to international armed conflict. Reference to armed conflict in the *chapeau* of paragraph 1 should therefore be deleted. The threshold for such crimes should be kept low, and the wording should be "widespread or systematic commission". The Tribunal for the Former Yugoslavia had also ruled that as long as there was a link with a widespread or systematic attack against a civilian population, a single act could qualify as a crime against humanity. The words "committed on a massive scale" should therefore be deleted.

110. She supported the listing of crimes against humanity in paragraph 1 (a) to (j).

111. **Mr. STIGEN** (Norway) agreed that the text on genocide should be sent to the Drafting Committee.

112. With respect to crimes against humanity, his delegation saw no need for a connection with armed conflicts. In the *chapeau* of paragraph 1 it would prefer the word "or" to "and". It was in favour of the listing in paragraph 1 (a) to (j) and saw no need for paragraph 2. The Conference should not try to define crimes against humanity.

113. **Mr. KOFFI** (Côte d'Ivoire) thought that the definition of genocide should now be transmitted to the Drafting Committee.

114. With respect to crimes against humanity, his delegation would prefer the wording "as part of a widespread or systematic attack in paragraph 1". No distinction should be made between the commission of crimes against humanity in peace or in war or between internal and international conflicts.

115. His delegation had no problem with the inclusion of paragraph 2.

116. **Mr. de KLERK** (South Africa) agreed that the definition of genocide could be referred to the Drafting Committee. His delegation supported the inclusion, in the definition, of conspiracy to commit genocide, attempt to commit genocide and complicity in genocide, but he agreed with the representative of India that further discussion should be postponed.

117. With regard to paragraph 1 of the section on crimes against humanity, his delegation was in favour of not linking the offences with armed conflict and preferred the word "or" rather than "and", for the reasons given by previous speakers. His delegation would have some comments on the offences listed in subparagraphs (e), (g) and (h) of paragraph 1 which could be best made in the relevant working group.

118. He agreed that paragraph 2 was unnecessary.

119. **Mr. MEKHEMAR** (Egypt) agreed that the definition of genocide was satisfactory and could now be transmitted to the Drafting Committee.

120. His delegation considered that crimes against humanity could be committed in times of peace or of war. However, to differentiate them from ordinary crimes, they should be described as systematic and widespread.

121. **Mr. MAHMOOD** (Pakistan) said that Pakistan opposed the concept of inherent jurisdiction of the Court for the crimes listed in article 5. All those crimes should be subject to the principle of complementarity, which would

be violated if the Court were to be given inherent jurisdiction. However, it should not be possible to exclude the "core" crimes from the Court's jurisdiction by a declaration.

122. Concerning the crime of genocide, the Genocide Convention, to which Pakistan was a party, gave States parties authority to try offenders. Pakistan had no problem with the inclusion of the crime of genocide provided it was subject to the principle of complementarity. Pakistan supported the inclusion of crimes against humanity in the Statute, but would make its comments at a later stage.

123. **Ms. FLORES** (Mexico) agreed that the definition of genocide could be referred to the Drafting Committee. References to conspiracy and attempt to commit genocide and complicity in genocide should be discussed by the Working Group on General Principles of Criminal Law.

124. Her delegation considered that crimes against humanity could be committed both in peace and in war and did not agree to their being linked with armed conflict. Such crimes should be qualified as "widespread or systematic" and no grounds needed to be spelt out.

125. Her delegation had no problems with the crimes listed in paragraph 1 (a) to (i), except that it considered that "persecution" and "enforced disappearances" would benefit from a definition. It did, however, have difficulties with (j) ("other inhumane acts"). An exhaustive list was required to satisfy the principle *nullum crimen sine lege*. Moreover, apartheid should have been included in the list.

126. Her delegation would reserve its comments on some of the texts in square brackets for discussion in the relevant working group.

127. **Ms. SHAHEN** (Libyan Arab Jamahiriya) agreed that the definition of the crime of genocide should be referred to the Drafting Committee.

128. She pointed out that in the draft Statute crimes against humanity were focused on acts violating physical integrity and not moral integrity. Nothing was said about the prohibition on practising religion, for instance.

129. She considered that the expression "political organization" in paragraph 2 (e) was too vague and that a clearer definition was needed. The Court should not invoke crimes of that type as a means of intervening in the internal affairs of States and infringing their sovereignty under the pretext of international legality.

130. **Ms. TRÖNNINGSDAL** (Finland) said, with respect to crimes against humanity, that she was in favour of the wording "as part of widespread or systematic commission of such acts".

131. She supported the retention of the list of crimes in paragraph 1 (a) to (j) and could agree to the deletion of paragraph 2 if that was the general wish.

132. **Ms. VARGAS** (Colombia) agreed with the definition of genocide in the draft Statute. Like the representative of Germany, she considered that matters such as complicity with genocide would be better dealt with in the Part 3 of the Statute on general principles of criminal law.

133. Her delegation also agreed that crimes against humanity should be covered by the Statute. There should be no link with armed conflict; such crimes could be committed in times of peace. She agreed that all the crimes listed

in subparagraphs (a) to (i) of paragraph 1 should be included, but her delegation had the same problems on (j) as the delegation of Mexico.

134. The question of including paragraph 2 should be discussed in a working group.

135. **Mr. SHARIAT BAGHERI** (Islamic Republic of Iran) agreed that the crime of genocide should fall within the jurisdiction of the Court.

136. His delegation considered that crimes against humanity could be committed in times of peace or war. It was in favour of the wording "widespread and systematic attack". It agreed that paragraph 2 should be deleted.

137. **Ms. BOREK** (United States of America) believed that genocide should be included in the draft Statute and that ancillary crimes should be dealt with comprehensively in the section on general principles of law.

138. With respect to crimes against humanity, she wished to point out that if situations arising in times of peace were not covered the Court would be denied jurisdiction over many of the crises that it should address.

139. Her delegation appreciated the concerns about sovereignty expressed by some delegations, and considered that care needed to be taken to avoid vagueness in the list of crimes; even some of the definitions in paragraph 2 were vague. Her delegation would be submitting a paper on elements of crimes taking account of the many useful comments it had received. Many offences were violations of human rights but could not be called crimes against humanity, which meant only the most atrocious crimes. It was therefore important to elaborate the elements of crimes. The list should be exhaustive to meet the principle of *nullum crimen sine lege*.

140. She agreed that there was no intention to cover terrorism in the list.

141. **Mr. HERSI** (Djibouti) agreed that the text on genocide could now be transmitted to the Drafting Committee.

142. With respect to crimes against humanity, he agreed on the inclusion of all the crimes identified. However, in the *chapeau* of paragraph 1, he considered that it would be difficult to apply the requirement that an attack against any civilian population had to be widespread. The Drafting Committee should seek more appropriate wording.

143. **Mr. EFFENDI** (Indonesia) supported the inclusion of both genocide and crimes against humanity in the Statute. He agreed that the text on genocide should be submitted to the Drafting Committee.

144. With respect to crimes against humanity, his delegation supported the first option in the *chapeau* of paragraph 1, and would prefer "and" to "or".

145. **Mr. GARCIA LABAJO** (Spain) said that his delegation agreed that the text on genocide should be sent to the Drafting Committee.

146. He agreed with the German representative that conspiracy, incitement and attempt to commit genocide and complicity in genocide would be more appropriately covered in Part 3 of the draft Statute, and specifically in article 23.

147. His delegation endorsed the view that crimes against humanity could be committed both in peacetime and in armed conflict, whether internal or international. Prosecution of crimes against humanity should not be confused with international humanitarian law, as otherwise the victims of atrocities might be left unprotected.

148. The terms "widespread" and "systematic" were not synonymous: the former was a quantitative description whereas the latter was qualitative. His delegation preferred the formulation "widespread or systematic".

149. **Mr. IVAN** (Romania) said his delegation believed that the crimes against humanity covered by the Statute should include acts committed both in international and non-international conflicts and also in peacetime. He therefore opposed a nexus with armed conflict.

150. His delegation was in favour of the wording "widespread or systematic" and of the deletion of paragraph 2. It agreed that the text on genocide should be sent to the Drafting Committee.

151. **Ms. DIOP** (Senegal) agreed that the text on genocide should be referred to the Drafting Committee and also that conspiracy, incitement and attempt to commit genocide and complicity in genocide should be included in Part 3.

152. In view of recent events, her delegation considered that the jurisdiction of the Court should apply to crimes against humanity committed during war or peace, and in internal or international conflicts.

153. **Mr. PALIHAKKARA** (Sri Lanka) agreed that the text on genocide could be sent to the Drafting Committee.

154. On crimes against humanity, the introductory wording to paragraph 1 would be decisive, and informal consultations were therefore necessary. His own delegation's inclination was to have a description that was not situation-specific or motive-related and would be valid in peace and in war.

155. His delegation had no difficulties with the list of crimes in paragraph 1, except that it shared the doubts expressed by the representative of Mexico with regard to subparagraph (j).

156. His delegation believed that paragraph 2 should be deleted; it would be unproductive to spend too much time on definitions.

157. **Mr. RODRIGUEZ CEDEÑO** (Venezuela) agreed that the text on genocide could be sent to the Drafting Committee.

158. He also agreed that crimes against humanity could be committed at any time and in any context. His delegation would prefer the wording "widespread or systematic attack".

159. In the list of crimes, both subparagraph (e) and subparagraph (i) were necessary and should be retained.

160. He agreed with the United Kingdom representative that paragraph 2 should not be deleted without further consideration.

161. **Mr. POLITI** (Italy) agreed that the text on genocide should be sent to the Drafting Committee and that conspiracy, incitement and attempt to commit genocide and complicity in genocide would be better addressed in Part 3.

162. With regard to crimes against humanity, his delegation agreed that, in the *chapeau* of paragraph 1, there should be no nexus with armed conflict, whether international or internal. His delegation was in favour of the wording "widespread or systematic attack".

163. As to the list of crimes, his delegation was in favour of including all the subparagraphs. In subparagraph (g), the words "of comparable gravity" were unnecessary. He strongly supported the inclusion of the words "or gender" in (h).

164. The "other inhumane acts" referred to in (j) should also be included, since otherwise new kinds of crime against humanity would go unpunished. "Inhumane acts" had been recognized by the Nuremberg, Former Yugoslavia and Rwanda Tribunals. They were also prohibited by the article 3 common to the Geneva Conventions and by the Convention against Torture.

165. His delegation, like others, would prefer the deletion of paragraph 2.

166. **Ms. CONNELLY** (Ireland) agreed that the text on genocide should be referred to the Drafting Committee.

167. She agreed that, in accordance with international law, crimes against humanity could be committed in times of armed conflict or in times of peace. The representative of Mexico had wished to include apartheid in the list of crimes: that was the subject of a convention in which there was no link with times of armed conflict.

168. The *chapeau* was clearly needed to distinguish individual criminal acts from the heinous crimes that were to be brought within the Court's jurisdiction. Her delegation was in favour of the wording "widespread or systematic attack".

169. She agreed with the representative of Jordan that there was no need for a reference to "grounds" in the *chapeau*. The right place for a reference to such grounds was in subparagraph (h). She supported the inclusion of "gender" in that subparagraph.

170. As to the inclusion of paragraph 2, her delegation remained flexible and would wait to hear further comments.

171. **Mr. GÜNEY** (Turkey) agreed that the text on genocide should be sent to the Drafting Committee.

172. As to crimes against humanity, his delegation was in favour of the wording "widespread and systematic attack" in the *chapeau* of paragraph 1, in line with established case law.

173. His delegation had difficulties with the present wording of paragraph 1 (i), which was confusing and could give rise to divergent interpretations in practice.

174. **The CHAIRMAN**, summing up the discussion, said that there seemed to be agreement that the text on genocide could be referred to the Drafting Committee. He suggested that the unbracketed part of the section on genocide might be referred to the Drafting Committee on the understanding that the suggestions concerning elements of crimes would be dealt with in the discussion on crimes against humanity. Some delegations had suggested that the part of the text on genocide in square brackets be included in Part 3 of the draft Statute, while others had indicated that they could take no final position until further progress had been made on Part 3. He therefore suggested that the bracketed part of the text should not be referred to the Drafting Committee for the time being.

175. He had noted that all delegations were in favour of including crimes against humanity in the Statute. With regard to the *chapeau* of paragraph 1 in that section, there were differences of view as to whether the adjectives "widespread" and "systematic" should be joined by "or" or "and", and further discussion on that point was clearly needed.

176. There was a difference of opinion as to whether there should be a nexus between crimes against humanity and armed conflict, and some delegations also wished to limit "armed conflict" to international armed conflict.

177. Questions had been raised as to the interpretation of some of the crimes in the list in subparagraphs (a) to (j) of paragraph 1. Subparagraph (i) on enforced disappearance of persons had given rise to more substantive comments, which would have to be addressed in due course. With regard to subparagraph (j), some delegations would prefer the list of "inhumane acts" to be exhaustive.

178. It had been suggested that the crime of apartheid should be added to the list.

179. With respect to paragraph 2, further discussion would be needed, since some delegations wished to delete it while others considered that at least some of the definitions would be useful in enabling general agreement to be reached.

The meeting rose at 1 p.m.

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COMMITTEE OF THE WHOLE

SUMMARY RECORD OF THE 4th MEETING

Held at the Headquarters of the Food and Agriculture Organization of the United Nations on Wednesday, 17 June 1998 , at 3 p.m.

Chairman: Mr. P. KIRSCH (Canada)

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V.98-57457 (E)

99-80933 (E)

The meeting was called to order at 3.20 p.m.

CONSIDERATION OF THE QUESTION CONCERNING THE FINALIZATION AND ADOPTION OF A CONVENTION ON THE ESTABLISHMENT OF AN INTERNATIONAL CRIMINAL COURT IN ACCORDANCE WITH GENERAL ASSEMBLY RESOLUTIONS 51/207 OF 17 DECEMBER 1996 AND 52/160 OF 15 DECEMBER 1997 (*continued*) (A/CONF.183/2/Add.1)

Part 2 of the draft Statute (continued)

Article 5 (continued)

1. **The CHAIRMAN** invited the Committee to resume its discussion on crimes against humanity.

2. **Mr. PIRAGOFF** (Canada) expressed concern at the suggestion that there needed to be a nexus between crimes against humanity and armed conflict. Canada's position was that no such nexus was required under modern international law, a view supported by the Convention on the Prevention and Punishment of the Crime of Genocide, Allied Control Council Law Number 10 (1945), the Statute of the International Criminal Tribunal for Rwanda and the draft Code of Crimes against the Peace and Security of Mankind. The decision of the Yugoslavia Tribunal Appeals Chamber in the Tadić case had confirmed that customary international law did not require such a nexus. It would be retrogressive to reintroduce a nexus requirement, which would hamper the Court's ability to deal with crimes against humanity in contexts similar to that of Rwanda.

3. With regard to the *chapeau* of paragraph 1 in the section on crimes against humanity, the wording "widespread or systematic" was clearly established in customary international law, as affirmed by the International Criminal Tribunal for the Former Yugoslavia and the Rwanda Tribunal. With regard to the wording in square brackets concerning grounds for an attack against a population, Canada's view was that such grounds were not part of the definition of crimes against humanity under customary international law and that any requirement regarding grounds would unnecessarily complicate the task of the prosecution. Moreover, a list of prohibited grounds of discrimination might inadvertently exclude groups which could be the victims of crimes against humanity.

4. **Mr. BALDE** (Guinea) said that his delegation favoured the second alternative in the *chapeau*, subject to the deletion of the reference to armed conflict, since crimes against humanity could well be committed in circumstances other than armed conflict. With respect to the list of acts constituting crimes against humanity, it would prefer "deprivation of liberty" as the broader term in subparagraph (e). It was in favour of retaining paragraph 2 as providing clarification of the acts listed.

5. **Mr. PANIN** (Russian Federation) said that his delegation was very much in favour of extending the jurisdiction of the Court to crimes against humanity. The *chapeau* of paragraph 1 should refer to "widespread and systematic" attacks against a civilian population. There was no doubt that crimes against humanity could be committed during both international and non-international conflicts, and the Court would have jurisdiction over crimes coming under general international law.

6. Concerning the list of acts enumerated in subparagraphs (a) to (j), his delegation would prefer the deletion of (h) and (i), which would be covered by (j). It had no strong feelings about the choice of wording in the first part of (e). He cautioned against any over-hasty deletions from paragraph 2, which had much to commend it.

7. **Mr. CAFLISCH** (Switzerland) said that his delegation shared the majority view that the definition of crimes against humanity should be applicable to times of both peace and armed conflict, whether international or internal.

In the *chapeau* of paragraph 1, it preferred the first alternative, with the wording "widespread or systematic". It agreed with the list of crimes enumerated in subparagraphs (a) to (j). Maintaining paragraph 2 might complicate matters and the paragraph might be better deleted, unless it could be simplified.

8. **Ms. SUNDBERG** (Sweden) said that her delegation did not wish to see any mention of a nexus between crimes against humanity and armed conflict and believed that the former should also cover crimes committed in peacetime and during internal conflicts. It would not favour creating a new threshold for the prosecution of those crimes and would prefer the wording "systematic or widespread" in paragraph 1. It supported the retention of all the crimes listed in subparagraphs (a) to (j), and would reserve its comments on the specifics for the relevant working group. It supported the deletion of paragraph 2.

9. **Mr. KROKHMAL** (Ukraine) said his delegation had no set position about the link word between "widespread" and "systematic" in the *chapeau* of paragraph 1. The definition of crimes against humanity should not be restricted to international conflicts. The enumeration of acts constituting crimes against humanity was acceptable. Since general international law did not provide a very clear definition of the acts listed in paragraph 1, paragraph 2 merited some examination. If there was not sufficient support for maintaining the whole of the paragraph, the matter might be considered further in the working group.

10. **Mr. CHUKRI** (Syrian Arab Republic) noted that the basis for the Tokyo and Nuremberg Tribunals had been the commission of crimes against humanity in the context of armed conflicts. There was also clearly some overlap between crimes coming under the heading of genocide, crimes against humanity and violations of human rights. It was not enough to engage in rhetoric; the intention was to establish an international criminal court, and the draft Statute must not be jeopardized. There might be some loopholes, but there would be no point in a convention that did not command enough support to secure its implementation.

11. **Mr. LOURENÇO** (Portugal) said that his delegation, like others, rejected any link between crimes against humanity and armed conflict, whether international or internal. It favoured the wording "widespread or systematic".

12. **Mr. ASSHAIBANI** (Yemen) said that crimes against humanity were committed in time of both war and peace; their specificity was that they were committed on a large scale.

13. **Mr. PHAM TRUONG GIANG** (Viet Nam) said that crimes against humanity should come within the jurisdiction of the Court. They could be committed both in peacetime and in time of armed conflict, both internal and international. Concerning paragraph 1, his delegation favoured the wording "widespread or systematic". It was flexible as to whether paragraph 2 should be retained or deleted.

14. **Mr. van der WIND** (Netherlands), referring to the *chapeau* of paragraph 1, said that his delegation was in favour of the first alternative, under which there would be no nexus between crimes against humanity and armed conflict of whatever nature, and of the wording "widespread or systematic", which adequately met the requirement for a threshold. It had serious doubts about the inclusion of motives where crimes against humanity were concerned, important though they were as an element with regard to genocide. It had no difficulty in accepting the acts listed and fully supported the observation made by the Italian delegation at the previous meeting concerning subparagraph (j). With respect to paragraph 2, it saw no need for any further elaboration of concepts in the Statute itself.

15. **Mr. Khalid Bin Ali Abdullah AL-KHALIFA** (Bahrain) said that crimes against humanity should include crimes committed in times of peace. However, the Court must concentrate on the most heinous crimes and refrain

from interfering in the internal affairs of States, in line with the principle of complementarity. In principle, the concept "widespread and systematic" should be connected with armed conflicts. His delegation would engage in further discussion with an open mind.

16. **Mr. FAYOMI** (Benin) agreed with others that a crime against humanity remained such whether or not it was committed during armed conflict. A link with armed conflict should therefore be discarded as being too restrictive. His delegation was in favour of maintaining paragraph 2, which very usefully defined crimes and their constituent elements; that would be important in bringing charges. Such definitions were regrettably missing in the Statute of the Rwanda Tribunal.

17. **Mr. NAGAMINE** (Japan) said h[illegible]elegation supported the inclusion in the Court's Statute of crimes against humanity. In the *chapeau* of paragraph 1, he favoured the wording "widespread and systematic", and considered that conduct in time of peace as well as war should be covered. With regard to the list of acts, the principle *nullum crimen sine lege* required a clear description of elements of crimes. He wondered whether it was appropriate to disassociate extermination from murder or genocide. Some qualifier was needed for "deportation" to indicate that it did not refer, for example, to transfers of populations in such situations as large-scale natural disasters. Similarly, a qualifier such as "unlawful" was needed before "imprisonment". More precise wording was also required in connection with the enforced disappearance of persons. Paragraph 2 would be helpful in clarifying the acts listed.

18. **Ms. TASNEEM** (Bangladesh) agreed that the Court should have inherent jurisdiction over crimes against humanity, including those committed in times of peace. It had been rightly observed that the key to a broad consensus lay in an agreed *chapeau* for paragraph 1. Her delegation did not believe that a link should be established between crimes against humanity and armed conflict, and supported the proposal to remove the enumeration of grounds for attacks on populations. It preferred the wording "widespread or systematic". It agreed with the list in subparagraphs (a) to (j), subject to more precise drafting, and supported the Mexican proposal to include apartheid, which was proscribed as a crime against humanity under the Constitution of Bangladesh. It commended the suggestion to include the use of obnoxious weapons in the list of crimes against humanity.

19. **Mr. TANKOANO** (Niger) said that crimes against humanity should fall within the jurisdiction of the Court, whether they were committed in times of peace or war and whatever their grounds. Since the cold war period, most crimes against humanity had been committed in internal conflicts; it should not be forgotten, either, that apartheid had been applied in peacetime. His delegation endorsed the comment made by the delegation of Benin on the constituent elements of crimes. No provisions in the Statute should be open to varying interpretations.

20. **Mr. CEDE** (Austria) said that, in the *chapeau* of paragraph 1, his delegation preferred the first alternative, without any reference to armed conflict, and the wording "widespread or systematic". It also saw some merit in maintaining paragraph 2 in view of the need for a precise definition of the crimes concerned, in accordance with the principle *nullum crimen sine lege*.

21. **Mr. PEREZ OTERMIN** (Uruguay) expressed support for the inclusion in the Statute of crimes against humanity. The reference to armed conflict under crimes against humanity was inappropriate in the light of recent events, and should be deleted. The use of the word "systematic" was not sufficient to distinguish crimes against humanity from ordinary crimes covered by domestic law. He therefore suggested the wording "systematic and widespread".

22. His delegation agreed with the list of acts in subparagraphs (a) to (j), except that, for the reasons given by Mexico, subparagraph (j) should either be deleted or made clearer. In principle he would be in favour of retaining paragraph 2, which was helpful in defining the crimes concerned, but he remained flexible on that point.

23. **Ms. FAIRWEATHER** (Sierra Leone) said that, in the *chapeau* of paragraph 1, her delegation favoured the first alternative and the wording "widespread or systematic", and wished to see no nexus with armed conflict, whether international or internal. It agreed with the inclusion of the acts listed in subparagraphs (a) to (i), but considered, like Mexico, that (j) might violate the principle *nullum crimen sine lege*. It was flexible on the inclusion or otherwise of paragraph 2.

24. **Mr. NATHAN** (Israel), referring to the text on genocide, expressed agreement with the suggestion that the enumeration of punishable acts could be included in Part 3, since the principle involved affected all crimes within the jurisdiction of the Court, not just the crime of genocide.

25. The concept of crimes against humanity should be differentiated from that of war crimes by specifying that they were crimes committed on a massive scale against any civilian population on political, racial or other grounds to be defined. Under existing customary international law there was no necessary nexus between armed conflict and crimes against humanity, the relevant documents being the Convention on the Prevention and Punishment of the Crime of Genocide, the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, Control Council Law Number 10 and the finding of the International Tribunal for the Former Yugoslavia in the Tadić case.

26. With respect to the enumeration of the acts constituting crimes against humanity, the word "unlawful" should precede "deportation" in paragraph 1 (d) because there might be deportations that were lawful under the fourth Geneva Convention of 1949. The words "of comparable gravity" in subparagraph (g) might be dropped and the words "or other similar" before "grounds" in (h) were also too vague. Also in (h), the final bracketed phrase should be deleted if it was agreed that there should not be a nexus between crimes against humanity, war crimes and other crimes within the jurisdiction of the Court. The words "or gender" could be maintained in that subparagraph. There was no need for all the detailed definitions given in paragraph 2, with the exception of terms needing such a definition, such as extermination and persecution. A distinction should be made between crimes against humanity and war crimes, although a certain measure of overlapping could not be avoided.

27. **Mr. SALINAS** (Chile) said that, in paragraph 1, his delegation favoured the first alternative and the reference to the "widespread or systematic" commission of the acts in question. There was no nexus between the existence of an armed conflict and the commission of crimes against humanity, and any introduction of such an element would be retrograde in the light of the development of international law in the previous 50 years. Regarding the enumeration of acts in subparagraphs (a) to (j), greater precision was needed, in particular, in the wording of (e) regarding detention or imprisonment as a crime against humanity. Enforced disappearance of persons should be included as a crime against humanity, as it was still used as a means of repression by authoritarian regimes. Greater legal precision was required for subparagraph (g). The definition of certain types of crimes contained in paragraph 2 was helpful and that paragraph should be retained.

28. **Mr. MANSOUR** (Tunisia) said that paragraph 2 of the section on crimes against humanity was a crucial component of the Statute. It was important to define offences; indeed, the wording of the paragraph needed to be more specific and he thought that it should be elaborated upon rather than deleted.

29. **Mr. ONWONGA** (Kenya) said that there should be no link between crimes against humanity and the existence of armed conflict, whether internal or external. It endorsed the view expressed by the delegation of Austria that paragraph 2 served a useful legal purpose in providing precise definitions.

30. **Ms. VEGA** (Peru) agreed that the crime of genocide should be included as the first crime within the jurisdiction of the Court, drawing attention to articles 2 and 3, in particular, of the Convention on the Prevention and Punishment of the Crime of Genocide. With respect to crimes against humanity, her delegation concurred with the delegation of Uruguay that the order of the words "widespread" and "systematic" should be reversed in the *chapeau* of paragraph 1, and favoured the deletion of paragraph 2; the conceptual definitions contained therein could perhaps be transferred to a concluding provision broadened to include other such definitions.

31. **The CHAIRMAN** recalled the conclusions he had drawn at the previous meeting with respect to crimes against humanity. Clearly, a working group would have to consider the matter in greater detail and submit draft revised provisions. With regard to genocide, he thought that it was agreed that the unbracketed part of the provision should be referred to the Drafting Committee; the comments made on some parts of the text would be debated in the context of the broader discussion of crimes against humanity. Discussion of the second, bracketed part of the text would be suspended pending further consideration of the issues in the context of Part 3 of the Statute.

32. He invited comments on the provisions concerning war crimes.

33. **Mr. van der WIND** (Netherlands), acting as Coordinator of Part 2 of the draft Statute, said that the definition of war crimes was divided into four sections, of which sections A and B concerned norms applicable in international armed conflict and sections C and D those applicable in internal armed conflict. The opening clause of section A took account of the fact that under the four Geneva Conventions the list of grave breaches was not always the same, which meant that protected persons were covered by different grave breach provisions depending on the Geneva Convention applicable to them. The wording of subparagraphs (a) to (h) was that of the Geneva Conventions, and it seemed from the Preparatory Committee discussions that there was general support for the inclusion of that section and for its current wording; further discussion might therefore not be required.

34. Section B contained a long list of norms. Of the two options presented under (a), the majority view seemed to favour the first, namely the inclusion of such a text. Views were more divided on (a *bis*) and further consultations might be needed.

35. Of the four options enumerated under section B (b), the first three differed in their approach to the proportionality principle, with option 3 omitting that principle. Positions were less clear on (b *bis*) and further consultations would be needed. The two options under (c) came from different sources and were worded differently, but were aimed at providing similar protection; an informal exchange of views might resolve the question. Subparagraphs (d) and (e) seemed to be generally acceptable.

36. The difference between the first and second options presented under (f) was that the second, whose wording was drawn from that of the Additional Protocol, referred both to the transfer of population and deportation, whereas the first referred only to the former, the reason being that a reference to deportation was already contained in section A. The only difference between the two options under (g) was the inclusion of buildings dedicated to education in option 2. Judging from discussions in the Preparatory Committee, subparagraphs (h) to (n) seemed to be generally acceptable.

37. There were several differences between the four options under subparagraph (o) concerning prohibited weapons. One was the reference in the *chapeau* to weapons which were "calculated" to cause superfluous injury or unnecessary suffering as opposed to those which were "of a nature" to do so. Another difference was reference or otherwise to the weapons as being "inherently indiscriminate". On the question of the list of weapons, option 3 proposed no such list, whereas the others contained either an exhaustive or a non-exhaustive list. Then there was the question, if there was a list of weapons, of which should be mentioned. Options 1, 2 and 4 contained an identical list of weapons in subparagraphs (i) to (v), but option 4 provided for three additional types of weapons.

38. The difference between the two options under (p) was that the second referred also to apartheid and other inhuman and degrading practices. Although there had seemed to be wide support for the inclusion of subparagraph (p *bis*), it now emerged that further consultations would be needed, and the suggestion was to engage in such consultations without a debate in the Committee. Subparagraphs (q), (r) and (s) appeared to be generally acceptable and might need no further discussion in the Committee.

39. With regard to the four options under (t), the fourth option proposed that there should be no paragraph relating to children, but that did not appear to be the majority view. The difference between the other three lay in the degree of protection and hence the extent of States' obligations.

40. With regard to section C, the first of the two sections on norms applicable in internal armed conflict, the only issue was whether the whole section should in fact be included in the definition of war crimes; there had been little discussion on the actual wording, which was taken almost literally from article 3 common to the four Geneva Conventions.

41. Under section D, subparagraph (f), the options were very similar to those proposed in section B, subparagraph (t), the differences in wording stemming from the fact that the norms applicable to international armed conflict and the sources used were somewhat different, as could be seen, for example, in options 2 and 3 which referred to armed forces or groups, and in the reference to allowing children to take part. Then there was an option II relating to section D and proposing the addition of certain provisions to the section, most of them taken from section B on international armed conflict. As to whether sections C and D should be included at all, most, but not all, delegations in the Preparatory Committee had favoured their inclusion.

42. Under the heading "Elsewhere in the Statute", there were three options, the third being that there should be no provision on threshold for the Court's jurisdiction in respect of the crimes in question, the second that it should have jurisdiction "only" when such crimes were committed as part of a plan or policy or of a large-scale commission of such crimes, and the third using the words "in particular" rather than the word "only". Lastly, there was a proposed article Y, which was considered by some delegations to require further clarification.

43. **The CHAIRMAN** suggested that the Committee should initially focus its discussion on sections A and B.

44. **Mr. CHUKRI** (Syrian Arab Republic) said that his Government's concern was with international and not internal armed conflict. He suggested that reference should be made to Additional Protocol I of 1977 to the Geneva Conventions in the *chapeau* of section A. He noted in that connection that some States did not consider the provisions of the four Geneva Conventions to be rules of customary international law. Regarding the various options and paragraphs, he said that, under section A, his delegation accepted all the subparagraphs. In section B, under subparagraph (a), it favoured option 1; under (a *bis*), it favoured option 1; under (b), it favoured option 3; under (b *bis*), it favoured option 2; under (c), it favoured option 1; under (f), it favoured option 3; under (g), it favoured option 2. It had no problems with (h), (i), (j) and (k), except that the Arabic version of (j) should be

brought into line with the English version. It had no problem with (n), (p *bis*) or (q), but favoured option 4 under (o), option 2 under (p) and option 1 under (t).

45. **Mr. SADI** (Jordan) said that there seemed to be a selective approach to the Geneva Conventions. His delegation would, as a matter of principle, oppose any attempts to marginalize one part of the Geneva Conventions, and appealed to all delegations to adopt a holistic approach to the Conventions.

46. Turning to section B, he said that his delegation favoured option 1 under (a). The wording "civilian objects which are not military objectives" in option 1 under (a *bis*) seemed to involve a contradiction, and he sought clarification. Under (b), the qualification of the damage caused by an attack on civilian targets as being "excessive" in relation to the military advantage anticipated raised serious problems as it implied a subjective standard. Who would determine whether or not the damage was excessive? In any case, attacks on civilian targets should not be justified by military objectives. It would be safer to have no qualification of the type proposed. The same comment applied to the language used in option 1 under (b *bis*).

47. With regard to (f), the wording "the transfer by the Occupying Power of parts of its own civilian population into the territory it occupies" was acceptable as being consistent with the fourth Geneva Convention, although ideally his delegation would like to see an extension of that principle, encompassing some kind of prohibition against deportation, which might have an ethnic cleansing dimension.

48. **Mr. HAMDAN** (Lebanon) endorsed the appeal of the representative of Jordan for a holistic approach to the Geneva Conventions, and expressed support for the options favoured by the Syrian delegation.

49. **Mr. SCHEFFER** (United States of America) stressed the importance of the principle of *nullum crimen sine lege*. There must be a clear understanding of what conduct was prohibited, especially in the area of war crimes, where the conduct itself might not be obviously unlawful. The crimes subject to the jurisdiction of the Court should be those clearly recognized as crimes under customary international law and should be precisely defined so as to protect the rights of the accused. Offences which were not universally or widely recognized should not be covered in the Statute. The definitions war crimes under article 5 were insufficiently precise. They were defined in terms that derived from their law-of-war treaty antecedents. To a certain extent, the substantive offences were duplicative and the definitions traditional and, to the uninitiated, ambiguous. Thus, article 5 did not provide the necessary guidance usually found in a criminal statute, nor even a clear enough statement of the law for practitioners and judges, unless they were experts in the laws of war, which judges and practitioners before the Court might not be. In an environment of legal vagueness, individuals had no clear guide to behaviour and the rights of the accused would be jeopardized.

50. In the Preparatory Committee, the United States delegation had proposed an annex to the Statute on definitional elements for crimes covered in article 5, and intended to submit a revised version of that text to the Conference. Detailed elements of crimes must be established as legally binding requirements with respect to judicial determinations of guilt.

51. His delegation was willing to continue to work with others to identify widely recognized and universally accepted provisions and to ensure that the Statute reflected those crimes that were well established under customary international law. Such crimes included grave breaches of the 1949 Geneva Conventions, as well as the offences involving the "means and methods of warfare" largely codified in the 1907 Hague Regulations respecting the Laws and Customs of War on Land.

52. His delegation was particularly concerned about the list of prohibited weapons contained in section B, subparagraph (o) of article 5. Efforts had been made in previous discussions to confine the list to those clearly and unequivocally banned under customary international law. As the law progressed, there would be opportunities, through future review conferences, to add additional prohibited weapons, but the Statute itself should be amended only when prohibitions on the employment of additional weapons had been universally established. To include "catch-all" provisions in the list would open the door to "collateral amendment" of the Statute when weapons conventions or protocols were amended to add new weapons, prohibitions or regulations. That would, in effect, deprive States parties to the Statute from participating in its revision. To establish an automatic linkage to criminal law could also severely complicate the adoption of other treaties.

53. Specifically, the inclusion of nuclear weapons, anti-personnel mines and blinding lasers was not consistent with the current state of international law but was "legislative" in nature. That was particularly grave in matters involving individual criminal responsibility. The addition of highly contentious weapons to the list was counter-productive and unhelpful to the negotiating process.

54. While his delegation understood and shared the desire to protect children, the use of children under the age of 15 years in hostilities was not currently a crime under customary international law and was another area of legislative action outside the purview of the Conference.

55. **Mr. WESTDICKENBERG** (Germany) said that there was general agreement that those who committed violations of the laws and customs applicable in armed conflict must be pursued wherever they might be, brought to trial and punished. Where national criminal justice systems were non-existent or unable or unwilling to prosecute a given serious war crime, the International Criminal Court should exercise jurisdiction. It was not the objective of the Conference to act as a legislator and create new norms and rules of humanitarian law. War crimes should be defined on the basis and in the framework of established international humanitarian law, including customary law. Since, however, humanitarian law had as yet no penal provisions but only prohibitions to be implemented by national criminal law, it was reasonable to focus on prohibitions generally considered to form part of customary international law.

56. The objective of adopting criminal norms providing for individual criminal responsibility required a high standard of precision and clarity, so that everyone, especially soldiers, knew clearly what behaviour constituted a war crime under the Statute. The essential elements of the offences and the minimum qualitative and quantitative requirements should be identified in order to safeguard the right of the accused to due process.

57. War crimes committed in non-international armed conflicts must be included in view of their increasing frequency and the inadequacy of national criminal justice systems in addressing such violations.

58. His delegation was in favour of introducing a general disclaimer clause to ensure that existing obligations of States under customary or conventional law would not be increased or diminished by the Statute.

59. It welcomed the fact that a large number of States seemed ready to accept a compromise formula with regard to the issue of a threshold clause. The jurisdiction of the Court should be limited to exceptionally serious war crimes.

60. His delegation advocated a pragmatic and compromise-oriented approach to the issue of war crimes. Efforts by the German delegation in the Preparatory Committee to bridge the gap between various proposals from other participants were reflected in the text now before the Conference. A 1997 German paper entitled "Reference Paper

on War Crimes" with the symbol A/AC.249/1997/WG.1/DP.23/Rev.1, pointing the way to a possible compromise, had been made available informally for consultation by delegations.

61. **Mr. DIAZ PANIAGUA** (Costa Rica) said that he would like to see all State practice taken into account in the Statute, including the practice of countries which, like his own, had no army. That all the war crimes listed were indeed crimes was beyond doubt. States had a responsibility to disseminate and abide by article 47 of the first Geneva Convention, article 83 of Additional Protocol I and other relevant rules and to ensure that their soldiers were aware of their provisions. Costa Rica's position was at the opposite pole to that of the United States of America.

62. With regard to the definitions in the draft Statute, his delegation accepted the whole of section A. Under section B, it preferred option 1 under (a), option 2 under (a *bis*), option 2 under (b), option 1 under (b *bis*), option 2 under (c) and option 2 under (f), on which there was an imperative need to achieve consensus. Under (g) it preferred option 2 and under (o) option 4, although option 2 might be an acceptable consensus formula. Under (p), it preferred the broader formulation of option 1, although possibly the specific elements of option 2 should be considered separately, and under (t) it preferred option 3, although option 2 might be an acceptable consensus formula.

63. **Ms. SHAHEN** (Libyan Arab Jamahiriya) expressed support for the inclusion of war crimes within the jurisdiction of the Court. With regard to section B, her delegation preferred option 1 under (a), option 1 under (a *bis*), option 3 under (b), option 2 under (b *bis*), option 1 under (c), option 3 under (f), option 2 under (g), option 4 under (o) and option 2 under (p). Regarding (p *bis*), rape was a punishable crime under Libyan legislation. Enforced pregnancy was the result of rape and it was the act itself that should constitute a crime. Under Libyan legislation, abortion, too, was a crime. That paragraph therefore warranted further consideration. Under (t), her delegation preferred option 1.

64. **Ms. WONG** (New Zealand) said that, under section B, subparagraph (g) concerning attacks against buildings was of particular concern to her delegation, which had been responsible for the addition of the word " education" in option 2. On the question of weapons, the New Zealand position was that the definition of war crimes must not fall short of existing, widely accepted standards of international humanitarian law as reflected in the Geneva Conventions and Additional Protocols, which, given the large number of States parties thereto, constituted customary international law. The universally accepted prohibition on using cruel weapons which by their very nature caused unnecessary suffering, going back to the 1907 Hague Regulations, must be recognized, and the advisory opinion of the International Court of Justice two years previously on the legality of the use of nuclear weapons was also relevant. New Zealand's proposal concerning subparagraph (o) appeared in option 3, which did not mention nuclear weapons but reflected the language of the Additional Protocols. An alternative would be to reflect the language of the Hague Regulations. Another issue to which New Zealand attached great importance was that of the safety of United Nations and associated personnel; that aspect of treaty-based crimes might be included in the definition of war crimes. She endorsed the suggestion that (p *bis*) might be dealt with elsewhere. Under the heading "Elsewhere in the Statute", New Zealand had proposed option 2. Her delegation was ready to discuss all those issues further at a later stage.

65. **Mr. QU Wencheng** (China) said that section A was acceptable. Under section B, his delegation preferred option 1 under (a), but proposed the addition of "and causing death or serious injury to body or health". Under (a *bis*), it also preferred option 1, subject to the addition of the same phrase. Under (b) it preferred option 2, and under (b *bis*) option 1. Under (c), it favoured option 2, with the addition of the word "intentionally" at the beginning and the same phrase concerning death or serious injury at the end. Under (f), it preferred option 2, but

with the addition of the words "which is not justified by the security of the population or imperative military reasons" after "into the territories it occupies". Under (g) it preferred option 1. It favoured option 1 under (o), option 2 under (p) and option 4 under (t). It also agreed with the United States suggestion that the Statute should include some elements of crimes so as to give the Court clear guidance in the future and to enable all countries and their soldiers to know what actions and what circumstances would constitute war crimes. By way of preliminary comment on sections C and D, he expressed reservations about the inclusion in the Statute of conflicts of a non-international character.

66. **Mr. AL AWADI** (United Arab Emirates) said his delegation favoured the inclusion of war crimes in the Statute. It had a small reservation concerning the placing of the words "not justified by military necessity" in subparagraph (d) of section A; otherwise section A was acceptable. With regard to section B, it preferred option 1 under (a), option 1 under (a *bis*), option 3 under (b), option 1 under (b *bis*), option 1 under (c), option 3 under (f) and option 2 under (g). It favoured option 4 under (o), with the second version of the *chapeau*, and under (d) preferred option 2. With respect to (p *bis*), it shared the Libyan delegation's reservations about the inclusion of enforced pregnancy. Under (t) it preferred option 2, but would not object to option 1. It considered that sections C and D should not be included in the Statute.

67. **Ms. DASKALOPOULOU-LIVADA** (Greece) said that war crimes clearly fell within the jurisdiction of the Court. Section A was acceptable as being consistent with international customary law as reflected in the Geneva Conventions. On section B, her delegation preferred option 1 under (a) and also option 1 under (a *bis*). Under (b) it preferred option 3 but could agree to option 2. It favoured option 1 under (b *bis*), option 2 under (c), option 3 under (f), option 2 under (g), option 2 under (o) and option 2 under (p). It favoured option 3 under (t), although it could see option 2 as a possible compromise. In general terms, it could accept the content of the paragraphs presenting no options. It was prepared to seek compromise solutions, without, however, departing from the basic principles underlying the whole exercise and losing sight of the fundamental purpose, which was to punish grave crimes.

68. **Mr. GARCIA LABAJO** (Spain) said that the Spanish delegation had submitted a specific proposal to expand the number of persons protected against war crimes. It stressed the importance of complying with the terms of the Geneva Conventions and with customary law as it emerged, *inter alia*, from certain provisions of Additional Protocol I. By proposing to expand the scope of protection to attacks against United Nations or associated personnel or against United Nations installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter, Spain was proposing to expand what might be described in modern humanitarian law as the "protection of protectors". Such protection should be provided in relation to both international and non-international armed conflict.

69. **Mr. PHAM TRUONG GIANG** (Viet Nam) expressed support for the inclusion of war crimes within the jurisdiction of the Court. Section A was acceptable. With regard to section B, his delegation favoured option 1 under (a), option 1 under (a *bis*), option 3 under (b), option 1 under (b *bis*), option 2 under (c), option 2 under (f), option 2 under (g), option 2 under (o), option 2 under (p) and option 1 under (t).

70. **Mr. Khalid Bin Ali Abdullah AL-KHALIFA** (Bahrain) agreed that war crimes should come within the scope of the Court. His delegation agreed with all the options chosen by the representative of the United Arab Emirates and with his comments on sections A, C and D. It also agreed with the Libyan delegation's reservations about subparagraph (p *bis*) in section B and the comment of the United Arab Emirates delegation on that point.

71. **Mr. DAIHIM** (Islamic Republic of Iran) said that the two questions to be asked in connection with the use of nuclear weapons were whether or not such weapons were covered by humanitarian law and what responsibility States had in that regard. Taking into account developments in regard to chemical weapons, for example, nuclear weapons, which were the most devastating weapons of mass destruction, should be considered for inclusion in the draft Statute. The recent advisory opinion of the International Court of Justice made it clear that nuclear weapons were covered by humanitarian law, and States must respect such law.

72. **Mr. SKIBSTED** (Denmark) expressed the view that the definitions of the various elements of war crimes in the Statute should be based on the 1949 Geneva Conventions and on both 1977 Additional Protocols. For the Court to be relevant, it must have jurisdiction over crimes committed not only in international armed conflicts but also in internal armed conflicts, which were the theatre of most war crimes committed today.

73. Section A could be directly referred to the Drafting Committee. With regard to section B, his delegation would prefer option 1 under (a), option 1 under (a *bis*), option 3 under (b), option 1 under (b *bis*), option 1 under (c), option 2 under (f) and option 1 under (g). Under (o), the difficult issue of prohibited weapons, Denmark preferred option 1 as being consistent with the principle of *nullum crimen sine lege* and with the need for a potential perpetrator to know in advance which acts or omissions would constitute war crimes. It would be preferable to have an exhaustive list of prohibited weapons. It sympathized with the generic approach for political reasons, but defining prohibited weapons should be left to Governments. Agreement on an enumerative list would be difficult to achieve at the Conference, but the appropriate remedy would be an effective review clause allowing for an automatic review of the list of crimes by the Assembly of States Parties, perhaps five years after the entry into force of the Statute. His delegation would like to see anti-personnel mines and blinding laser weapons included in the list contained in option 1. Under (p) it preferred option 2, and under (t) it was flexible as between option 2 and option 3, but wished to see "fifteen years" replaced by "eighteen years".

74. **Ms. SUNDBERG** (Sweden) endorsed the comments of the representative of Denmark. In order for the Court to be politically relevant, it must have jurisdiction over war crimes as defined in the Geneva Conventions and both Additional Protocols. Section D should therefore be more or less a mirror of section B. As to the effect of using chemical weapons, there was no difference between international and internal conflicts. It was also of great importance to provide for existing prohibitions on weapons or methods of warfare which were of a nature to cause injury or unnecessary suffering or which were inherently indiscriminate. Future prohibitions of conventional weapons should also be included, as should attacks against United Nations personnel.

75. Her delegation was in favour of referring section A to the Drafting Committee. With regard to section B, it favoured option 1 under (a), option 1 under (a *bis*), option 2 under (b), option 1 under (b *bis*), option 2 under (f) and option 1 under (g). Under (o) it favoured option 4 but could accept option 2. Under (p) it preferred option 1, and under (t) option 2, but, like Denmark, thought that the prohibition should apply to persons under the age of 18. It supported the inclusion of a review clause for the list of crimes concerned.

76. **Mr. FADL** (Sudan) said that, as the four 1949 Geneva Conventions, to which there had been near-universal accession, were now an integral part of international law, it was appropriate that they should be reflected in the section of the Statute concerning war crimes. His delegation also supported the inclusion of nuclear weapons and anti-personnel mines. Additional Protocols I and II had been ratified by fewer States than the Conventions themselves and Additional Protocol II did not enjoy the status of established international law; it also provided a loophole for interference in the internal affairs of States. His delegation therefore had reservations about the inclusion of provisions based on Additional Protocol II. It favoured option 3—that there should be no provision

on threshold—under the section entitled "Elsewhere in the Statute". Given the divergence of views on Additional Protocols I and II, he proposed that the matter be considered further in a working group.

The meeting rose at 6 p.m.

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COMMITTEE OF THE WHOLE

SUMMARY RECORD OF THE 5th MEETING

Held at the Headquarters of the Food and Agriculture Organization of the United Nations on Thursday, 18 June 1998, at 10 a.m.

Chairman: Mr. KIRSCH (Canada)

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V.98-57458 (E)
99-80939 (E)

CONSIDERATION OF THE QUESTION CONCERNING THE FINALIZATION AND ADOPTION OF A CONVENTION ON THE ESTABLISHMENT OF AN INTERNATIONAL CRIMINAL COURT IN ACCORDANCE WITH GENERAL ASSEMBLY RESOLUTION 51/207 OF 17 DECEMBER 1996 AND 52/160 OF 15 DECEMBER 1997 (*continued*) (A/CONF.183/2/Add.1; A/CONF.183/C.1/L.1 and L.4)

Part 2 of the draft Statute (*continued*)

Article 5 (*continued*)

1. **The CHAIRMAN** invited the Committee to continue the discussion on sections A and B of the part of the article devoted to war crimes.

2. **Mr. DIVE** (Belgium) said that his country's attitude had always been that the Court should try serious breaches of conventional and humanitarian law. With regard to manifest conventional law, there seemed to be little room for manoeuvre.

3. Section A should be referred *in toto* to the Drafting Committee.

4. His preferences for the various paragraphs of section B were as follows: (a), option 1, see article 51 of Additional Protocol I to the Geneva Conventions; (a *bis*), option 1, see article 52 (a) of Additional Protocol I; (b), option 2, see article 57 (2) (b) of Additional Protocol I; (b *bis*), option 1, see article 56 of Additional Protocol I; (c), option 1. A text similar to paragraph (c) appeared in many instruments, including the Geneva Conventions.

5. Paragraphs (d) and (e) should be referred immediately to the Drafting Committee. He favoured option 2 of paragraph (f), which exactly reproduced the text of article 85 (4) (a) of Additional Protocol I; with regard to (g), he favoured option 1.

6. Paragraphs (h) to (n) should be referred immediately to the Drafting Committee as they stood. On paragraph (o), his delegation had always in principle supported an option that did not contain a list of weapons, since that would avoid a difficult debate. On the whole, he therefore supported option 3, since it was essential to give the Court the power to prosecute the use of weapons with indiscriminate effects. Even though he might be prepared to accept an option including a list of banned weapons, any such list should include weapons with indiscriminate effects.

7. He supported option 1 of paragraph (p) and entirely supported paragraph (p *bis*), in the light of the latest decrees by the International Criminal Tribunal for the Former Yugoslavia. Paragraphs (q) to (s) should immediately be sent to the Drafting Committee.

8. With regard to the protection of children, the Conference must note the development of customary international humanitarian law based on the 1977 Additional Protocols and article 38 of the Convention on the Rights of the Child. He favoured option 2 of paragraph (t) but reiterated his delegation's view that the age limit should be raised to 18 in view of negotiations under way in Geneva on the adoption of an additional protocol to the Convention on the Rights of the Child.

9. **Mr. AL ANSARI** (Kuwait) agreed that war crimes should fall within the jurisdiction of the Court. He supported the suggestion that a new paragraph on serious violations of the Geneva Conventions and the Additional Protocols should be inserted.

10. His preferences for the relevant paragraphs of section B on war crimes were as follows: (a), option 1; (b), option 3; (b *bis*), option 1; (c), option 1; (f), option 3; (g), option 2; (o), option 4; (p), option 2.

11. The term "enforced pregnancy" in paragraph (p *bis*), should be reconsidered because rape was in any case criminalized and it might be considered that pregnancy was an aggravating circumstance of rape. The question of threats to the identity of the civilian population should be considered in a different context.

12. He preferred option 1 of paragraph (t).

13. **Mr. HAMDAN** (Lebanon) supported the remarks made by Kuwait. He preferred option 1 of (a *bis*) and said that the position of neutral forces should also be mentioned. On paragraph (f), his delegation preferred option 3 and supported the principle that individual or mass forcible transfers, as well as the deportation of protected persons from occupied territories to the territory of the occupying Power, should be prohibited. Furthermore, the occupying Power should not deport or transfer all or part of its own civilian population into occupied territories. Deportation was also considered a grave breach under article 147 of the Fourth Geneva Convention. Furthermore, a number of resolutions had been adopted condemning the establishment of settlements in occupied territories.

14. He preferred option 4 of paragraph (o), but had some reservations on the inclusion of anti-personnel mines. As an occupied country, Lebanon had not signed the Ottawa Convention.

15. He drew attention to the opinion of the International Court of Justice that the use or threat of use of nuclear weapons would generally be contrary to the rules of international law applicable to armed conflict and in particular to the principles and rules of humanitarian law.

16. With regard to paragraph (p *bis*), he agreed with the reservations expressed by a number of previous speakers concerning the inclusion of "enforced pregnancy". In view of reports on crimes committed in Bosnia and Herzegovina, he suggested that it might be better to refer to forcible pregnancies the purpose of which was to change the identity of a population group.

17. Paragraph (t) covered a most important issue. While he fully understood the apprehensions expressed on many sides with regard to the recruitment of children in armed forces, he pointed out that many developing countries would have great difficulty in embracing such a provision because of their local culture. It would be unacceptable to his delegation for the Court to have the right to interfere in the internal affairs of such countries. He therefore favoured option 1 and trusted that it would subsequently perhaps be possible to develop it further. His own country did not allow the recruitment of children under the age of 18 into regular armed forces, but different circumstances might apply in the context of a struggle against an occupying Power.

18. **Mr. Seung-hoh CHOI** (Republic of Korea) said that he had no problem in accepting section A.

19. With regard to section B, his preferences were as follows: (a), option 1; (a *bis*), option 1; (b), option 1; (b *bis*), option 2; (c), option 2; (d) and (e), as drafted; (f), option 3; (g), option 2; (h) to (n), as drafted; (o), option 2; (p), option 2; (p *bis*) to (s), as drafted; (t), option 3.

20. **Mr. MADANI** (Saudi Arabia) associated himself with the position that war crimes within the competence of the Court should include grave breaches of the Geneva Conventions and the Additional Protocols.

21. His preferences with regard to the various paragraphs of section B were as follows: (a), option 1; (a *bis*), option 1; (b), option 3; (b *bis*), option 2; (d), option 1; (f), option 3; (g), option 2; (h) to (n), as drafted; (o), option 4.

With regard to paragraph (p *bis*), he reaffirmed his delegation's view that references to enforced pregnancy should be deleted because the law in his country did not allow abortions, except for health reasons established by a doctor and in the event of danger to the mother.

22. **Mr. DHANBRI** (Tunisia) said that he had no objection to the adoption of section A.

23. With regard to the various paragraphs of section B, his preferences were as follows: (a), option 1; (a *bis*), option 1; (b), option 3; (b *bis*), option 1; (c), option 1; (d) and (e), as drafted; (f), option 3; (g), option 2. With regard to paragraph (g), he asked whether option 2 would imply that it was permissible to attack the sick and wounded when the buildings in which they were accommodated were being used for military purposes. He therefore asked for deletion of that passage, which was in contradiction to the provisions of paragraph (q). On other paragraphs, his preferences were as follows: (h) to (n), as drafted; (o), option 4; (p), option 2; (p *bis*) to (s), as drafted; (t), option 3. In order to ensure consistency with the Convention on the Rights of the Child, the age limit should be raised to 18.

24. **Mr. NIYOMRERKS** (Thailand) said that, when considering the inclusion of war crimes under the Statute, it was first necessary to see what was established by the Geneva Conventions and what in the opinion of jurists would constitute customary international law.

25. He agreed to the inclusion of section A.

26. His preferences with regard to the various paragraphs of section B were as follows: (a), option 1; (a *bis*), option 1; (b), option 1; (b *bis*), option 2; (c), option 2, since that text coincided with Additional Protocol I and since the establishment of demilitarized zones had to be stipulated by special agreements; (d) to (e), as drafted; (f), option 3; (g), option 2, owing to the inclusion of educational buildings; (h) to (n), as drafted; (o), option 4, with its extensive lists of activities. He was in favour of including the use of nuclear weapons as a war crime, being an active party to the South-East Asia Nuclear-Free Zone. He preferred option 2 of paragraph (p), since it included a reference to apartheid, and could accept paragraphs (p *bis*), (q), (r) and (s) as drafted. His preference was for option 3 of paragraph (t).

27. **Mr. ALABRUNE** (France) said that he had no comments on section A, which reproduced provisions from the Geneva Conventions.

28. With regard to section B, his delegation supported the principle that belligerents did not have unlimited rights with regard to the weapons that they could use. Accordingly, the list of definitions should reflect the Hague and Geneva Conventions. Some passages in Additional Protocol I could give rise to difficulties with regard to different interpretations of the notion of military necessity. The French delegation was prepared to be more flexible with regard to provisions covering intentional attacks against the civilian population. He preferred option 1 of paragraphs (d) and (g), which reflected provisions of the Hague Convention. He was prepared to accept some flexibility in the drafting of paragraph (f). With regard to paragraph (o), he urged the adoption of a limitative list of prohibited weapons and conduct on the lines of article 23 of the Hague Convention and therefore supported option 1. References couched in too general terms to weapons whose prohibition was not established in current positive law would not be acceptable to his delegation, nor would references to customary international law that was still evolving. A provision prohibiting weapons that would be the subject of a treaty subsequently ratified might be acceptable provided it was clear that it would be applicable only to States that had ratified the treaty in question.

29. With regard to paragraph (t), he favoured a provision for the protection of children and was prepared to consider an amendment to that paragraph that would facilitate a consensus.

30. **Mr. MEKHEMAR** (Egypt) said that he too attached great importance to the inclusion of war crimes within the jurisdiction of the Court. He also supported the inclusion of recognized principles of customary international law.

31. Section A should include a reference to the Additional Protocols, which had become a kind of customary international law. He would have comments on that point in the relevant working group.

32. Section A could be sent to the Drafting Committee as it stood.

33. With regard to section B, his preferences were: (a), option 1; (a *bis*), option 1; (b), option 3; (b *bis*), option 1; (c), option 1; (d) and (e), as drafted; (f), option 3, a matter of particular importance to his delegation; (g), option 2; (o), option 4; (p), option 2. On paragraph (p *bis*), he agreed with previous speakers that enforced pregnancy should be mentioned in the context of rape. He accepted paragraphs (q), (r) and (s) as drafted and preferred option 1 of paragraph (1).

34. **Mr. PANIN** (Russian Federation) supported the proposal to forward section A to the Drafting Committee as it stood. Section B was a more complicated matter. Its provisions should be brought into line with the spirit and letter of existing international law, since the Conference's mandate did not include the progressive development of international law.

35. His preferences with regard to the various paragraphs of section B were as follows: (a), option 1; (a *bis*), option 1; (b), option 1; (b *bis*), option 2; (c), option 2; (d) and (e), as drafted; (f), option 2; (g), option 1; (h) to (n), as drafted.

36. With regard to paragraph (o), any list of banned weapons should include nuclear weapons. Since it did not believe that international law contained any direct prohibition of the use of nuclear weapons, the Russian Federation was in favour of option 1. With regard to further paragraphs, his preferences were as follows: (p), option 1; (p *bis*) to (s), as drafted; (t), option 2.

37. **Ms. WILMSHURST** (United Kingdom), speaking on section B, noted that most delegations preferred option 1 of paragraph (a). Her preference with regard to paragraph (a *bis*) was for option 1, though she noted the very cogent statement by the representative of Jordan. However, the drafting of option 1 could be improved by inserting a comma after the words "civilian objects", and adding the words "that is, objects" before the word "which". On paragraph (b), she preferred option 2 and pointed out that option 3 was too broad and therefore unrealistic. She advocated the deletion of paragraph (b *bis*) as that provision was already covered under paragraph (b). On paragraph (c), opinion seemed to be tending towards option 1; she believed that the proposers of option 2 seemed to have been inclined to withdraw it at the most recent Preparatory Committee session.

38. With regard to paragraph (f), she well understood the preference for options 2 and 3 but preferred option 1, because option 2 overlapped with the "grave breaches" provisions of the Geneva Conventions, which were in any event covered by section A, and option 3 made new law.

39. She preferred option 1 of paragraph (g). Though she did not dispute the principle of protecting schools, it seemed to her to be not only unnecessary but also wrong to specify them in the relevant provision because of the apparent implication that schools could be military objects.

40. Her delegation very firmly advocated an exhaustive list of weapons in paragraph (o), as it would be wrong to give a criminal court the power to rule *ex post facto* on the legality of weapons systems. She preferred option 1 of paragraph (p), as option 2 was duplicative. On paragraph (t), she pointed out that option 2 reflected a possible compromise that had been arrived at after long negotiations.

41. She had great sympathy with the proposals put forward by Spain in document A/CONF.183/C.1/L.1 but thought that the proposal might have the effect of diverting protection already given under the Geneva Conventions to United Nations personnel, who would not be party to a conflict and would therefore be protected persons. The question also arose whether protection should be limited to United Nations personnel. There were also technical difficulties with regard to the Spanish proposal contained in document A/CONF.183/C.1/L.4, which she intended to discuss bilaterally with the Spanish delegation.

42. **Mr. JENNINGS** (Australia) supported the generic approach in option 3 of paragraph (o) and noted that the form of wording had its genesis in the 1907 Hague Convention, which was further developed in Additional Protocol I to the Geneva Conventions. He would respectfully disagree with the view that the generic approach was insufficiently specific and felt that the Court should be well placed to decide the issue, since it would probably consist of judges who were experts in criminal law and international law and would furthermore be guided and assisted by submissions from the Prosecutor.

43. He noted that option 1 of paragraph (o) used the form of words "calculated to cause superfluous injury" which was taken from the 1907 Hague Convention, while options 2, 3 and 4 used the formulation "of a nature to cause ...", which was taken from Additional Protocol I of 1977. He suggested that the relevant development in the law be reflected in the Court's Statute, particularly in view of the widespread acceptance of Additional Protocol I, which had already been ratified by some 250 States.

44. **Mr. VERGNE SABOIA** (Brazil) said that section A presented no problems for his delegation.

45. In section B, paragraph (a), he preferred option 1 and noted that the word "intentionally" was used throughout the text while the word used in other legal instruments was "wilfully". That point might be examined by the Drafting Committee.

46. With regard to the various paragraphs of section B, his preferences were as follows: (a *bis*), option 1; (b), option 3; (b *bis*), option 1; (c), option 2; (d) and (e), referral to the Drafting Committee; (f), option 2; (g), option 2; (h) to (n), as drafted. Under paragraph (o), he favoured option 2 because it listed the kinds of weapons that were currently prohibited and left the question of the future inclusion of other categories open. Landmines and blinding laser weapons should already be included and, eventually, nuclear weapons, but he pointed out that international law was still evolving on that question. The words "inherently indiscriminate" should perhaps be added to the heading of the paragraph. His preferences with regard to other paragraphs were as follows: (p), option 2; (p *bis*) to (s), as drafted; (t), option 3. He understood that the age of 15 was a compromise but supported increasing the age to 18 in view of the draft optional protocol to the Convention on the Rights of the Child currently being negotiated in Geneva.

47. **Mr. KERMA** (Algeria) said that section A could be sent to the Drafting Committee as it stood.

48. His preferences with regard to the various paragraphs of section B were: (a), option 1; (a *bis*), option 1; (b), option 2; (b *bis*), option 1; (c), option 2; (d) and (e), as drafted; (f), option 3; (g), option 2; (h) to (n), direct referral to the Drafting Committee; (o), option 4; (p), option 2; (q) to (s), as drafted; (t), option 1.

49. **Mr. RODRIGUEZ CEDEÑO** (Venezuela) supported the proposal to refer section A to the Drafting Committee as it stood.

50. With regard to the various paragraphs of section B, his preferences were: (a), option 1; (b), an important provision, option 2; (c), option 1; (d) and (e), as drafted; (f), option 2 as being the clearest formulation; (g), option 2; (o), a very important provision, option 4 as being the most comprehensive and referring to other weapons covered by customary international law. His delegation had no definite preference with regard to the options to paragraph (t), which was nevertheless important to his delegation, but thought that option 3 was perhaps the most appropriate. The matter would have to be given further careful consideration.

51. On sections C and D he agreed with "OPTION I" because crimes against humanity should be defined regardless of the context or their content. Such matters would be taken up specifically in the working group.

52. **Mr. EFFENDI** (Indonesia) said that, as a strong supporter of a nuclear-free zone in South-East Asia, he preferred option 4 of paragraph (o). If the new reality could be accepted in the context of defining crimes against humanity, it should also be accepted with regard to the use of nuclear weapons.

53. **Mr. NAGAMINE** (Japan) said that the provisions should be examined in terms of clarity, precision and reflection of existing rules of international law.

54. On sections C and D, his delegation advocated that the Statute should cover not only international but also internal conflicts.

55. Section A presented no problems.

56. His preferences with regard to the paragraphs of section B were: (a), option 1, in which context he agreed with the delegation of China that the phrase "which cause death or serious injury to body or health" should be included at the end of option 1. The same remark also applied to paragraph (a *bis*), option 1; he was critical regarding paragraph (b), but preferred option 2 because of its clarity; on (b *bis*), he preferred option 1, subject to the comments already made on (a); on (c), he marginally preferred option 1; (d) should remain as drafted. With regard to (e), he thought that the improper use of a neutral flag should also be stipulated. Paragraph (f) should be included as it referred to a grave breach of Additional Protocol I; he was flexible with regard to the options but tentatively preferred option 1. His delegation's position was also flexible with regard to options 1 and 2 of paragraph (g), while paragraphs (h) to (n) presented no problems. He drew attention to the importance of clarity, precision and reflection of existing rules of international law with regard to the subject covered by paragraph (o); his delegation would participate with keen interest and an open mind in the discussion on that very difficult matter. With regard to paragraph (p), he preferred option 2, as option 1 was not clear enough. Paragraphs (q) to (t) should all be included.

57. **Mr. CAFLISCH** (Switzerland) agreed that section A should be referred to the Drafting Committee as it stood.

58. His preferences with regard to the various paragraphs of section B were: (a), option 1; (a *bis*), option 1, though he would not insist, provided that option 1 of paragraph (a) was accepted; (b), option 3, though option 2 would be acceptable as a compromise; (b *bis*), option 1; (c), option 1; (d) and (e), direct referral to the Drafting Committee; (f), option 2; (g), option 2, though option 1 would be acceptable; (h) to (n), referral to the Drafting Committee; (o), option 4; (p), option 1; (p *bis*) to (s), referral to the Drafting Committee; (t), option 2.

59. **Mr. KAMBOVSKI** (The former Yugoslav Republic of Macedonia) said that he accepted the Preparatory Committee's text of section A.

60. With regard to section B, his preferences were: (a), option 1; (a *bis*), option 2; (b), option 1; (b *bis*), option 2; (c), option 1; (f), option 1; (g), option 1; (o), option 2; (p), option 1; (t), option 2.

61. He accepted "OPTION I" of sections C and D. In that general context, his preferences with regard to section D were: (a), option 1; (c), option 1; (f), option 2; (l), option 2.

62. **Mr. CHERQUAOUI** (Morocco) indicated his preferences with regard to the various paragraphs of section B, namely: (a), option 1; (b), option 3; (b *bis*), delete; (c), option 1; (d) to (l), as drafted; (o), option 3; (p), option (2). He understood the concerns of some delegations regarding enforced or involuntary pregnancy and thought that the drafting should be made more specific. He accepted paragraphs (q) to (s) and preferred option 4 of paragraph (t).

63. **Ms. KOLSHUS** (Norway) concurred with the statements made by Denmark on the previous day and invited delegations who wished to ascertain the Norwegian position to contact her delegation.

64. **Mr. POLITI** (Italy) said that he attached great importance to the inclusion within the jurisdiction of the Court of serious offences committed in both international and non-international armed conflict. The definitions in sections A and B should be based as far as possible on the texts of the Geneva Conventions of 1949.

65. Accordingly, section A should be sent to the Drafting Committee as it stood.

66. His preferences with regard to the various paragraphs of section B were: (a), option 1; (a *bis*), option 1; (b), option 2; (b *bis*), option 1; (f), option 2; (g), option 2, with the inclusion of attacks against internationally protected cultural property in accordance with an amendment proposed by Spain. The question of paragraph (o) required further discussion, in which context he would be prepared to work on a solution consistent with the principle *nullum crimen sine lege*; (p), option 1. He would comment later on paragraph (p *bis*) and, under paragraph (t), favoured granting the maximum possible protection to children throughout the Statute, and in particular within the provisions concerning war crimes. His first choice on (t) would be for option 3, but he was working intensively to find a formula on which agreement could be reached.

67. He did not favour the inclusion of a reference to a threshold in the Statute, though the compromise in option 2 under the heading "Elsewhere in the Statute" would seem to be acceptable. He was in favour of a disclaimer clause such as that in the proposed article Y.

68. **Ms. CUETO** (Cuba) considered that the list of definitions of war crimes was selective. Furthermore, her delegation could not accept the idea of defining as a war crime the use of any kind of weapon causing superfluous injury or indiscriminate suffering unless a distinction were made between the use of nuclear weapons and of certain kinds of conventional weapons which were the only means of self-defence for some developing countries.

69. As to section B, she agreed with the general trend of the discussion concerning paragraphs (a) and (a *bis*). She favoured option 1 of paragraph (b) and of paragraph (b *bis*), with the deletion of the words "excessive" and "to civilians" in the third line of the latter. She preferred option 2 of paragraph (c). With regard to paragraph (e), she proposed the deletion of the words "resulting in death or serious personal injury". She favoured option 3 of paragraph (f) and option 2 of paragraph (g). Option 1 of paragraph (o) was preferable, with the addition of a new subparagraph (vi) reading "nuclear weapons" and a new subparagraph (vii) reading "blinding laser weapons". On

paragraph (p), she preferred option 2, and on paragraph (t), option 3, because of the need for maximum protection of children in armed conflict.

70. **Ms. ÜNEL** (Turkey) agreed to section A as it stood. Her preferences with regard to the various paragraphs of section B were: (a), option 1; (a *bis*), option 2; (b), option 3; (b *bis*), option 2; (f), option 1; (o), option 3. She was opposed to any reference to customary international law such as that in option 4 of paragraph (o). She preferred option 2 of paragraph (p) and of paragraph (t).

71. **Mr. SHARIAT BAGHERI** (Islamic Republic of Iran) supported the inclusion of war crimes in the Statute. Since his country had acceded to the Geneva Conventions of 1949, he agreed that section A should be sent as such to the Drafting Committee.

72. On section B, his preferences were: (a), option 1, though he agreed with the representatives of China and Japan that the words "when these acts bring about serious injury and death" should be added at the end of that option; (a *bis*), option 1; (b), option 2; (b *bis*), option 1; (c), option 2; (d) and (e), as drafted; (f), option 2, in which context he supported the proposal of New Zealand for the inclusion of educational establishments; (h) to (n), referral to the Drafting Committee; (o), option 4; (p), option 2. On paragraph (p *bis*), he associated himself with previous speakers who considered that inclusion of the wording "enforced pregnancy" might be used as an argument against the prohibition of abortion and should therefore be dropped. He could accept paragraphs (q), (r) and (s) and preferred option 1 of paragraph (t).

73. **Ms. FLORES** (Mexico) said that war crimes should be included but that clear definitions based on existing international law were necessary. The text before the Committee was too long and it would be better to have a single list of all forms of conduct to be banned. She was prepared to cooperate in preparing definitions that would be more simple and straightforward without a division into sections, and advocated the closest possible adherence to the language of the Geneva Conventions and Additional Protocol I.

74. She attached basic importance to paragraph (o) on the use of weapons and preferred option 3. She disagreed with the approach based on drawing up a list of weapons, but was flexible on that point. In any case, such a list would have to include nuclear weapons, particularly when poisoned weapons were already included.

75. **The CHAIRMAN**, summing up the discussions up to that point, said that section A seemed to be generally accepted. In section B, it seemed to be the general view that paragraphs (d), (e), (h) to (n), (q), (r) and (s) should be sent to the Drafting Committee as they stood. He would seek the advice of the Coordinators before determining how to proceed on those points.

76. On the other hand, other provisions, namely (a), (a *bis*), (b), (b *bis*), (c), (f), (g), (o), (p), (p *bis*) and (t), seemed to require either amendment or more discussion, and in some cases substantially more discussion. Since a coordinator would be appointed with the task of determining how far informal consultations or working group meetings might be needed, and whether the Committee of the Whole would need to discuss those issues again, he appealed to delegations to address only provisions that were in dispute.

77. **Mr. NATHAN** (Israel) said that the crimes to fall within the jurisdiction of the Court should be defined with the utmost precision and clarity, on the basis of generally accepted norms of customary international law. It was not the task of the Conference to legislate or progressively develop international law.

78. It was important to include a provision on thresholds on the lines of the *chapeau* to article 20 of the draft Code of Offences against the Peace and Security of Mankind prepared by the International Law Commission.

79. He could accept section A. With regard to section B, he noted that many of its provisions were drawn from Additional Protocol I and did not reflect customary international law. Furthermore, that section contained serious omissions and changes when compared to Additional Protocol I, with the result that the balance was altered. Also, certain parts of section B overlapped with section A.

80. His preferences and comments on the individual paragraphs were: (a), option 1 accepted, subject to amendment; (a *bis*) should be deleted; (b), option 1 accepted, subject to amendment; (b *bis*) should be deleted; (c), option 1; (d) and (e), accepted; (f) should be deleted; (g) should be brought into line with either the Additional Protocol or the Geneva Conventions; (h) to (k), accepted; (l) overlapped with the Geneva Conventions; (m) and (n), accepted; (o), option 1 accepted, though subparagraph (v) involved *ex post facto* legislation and should be reconsidered; (p) was part of common article 3 of the Geneva Conventions and should not appear in section B; there was some overlapping in (r), which should also refer to attacks resulting in death or personal injury not justified by military necessity; the last part of (s) was not included in the Geneva Conventions and was not an element of customary international law. On (t), he preferred option 1.

81. **Mr. GARCIA LABAJO** (Spain) presented the proposals of his delegation on sections B and D that had been distributed under symbol A/CONF.183/C.1/L.4. In paragraph (g) of section B, it was proposed to add a reference to "intentionally directing attacks against ... internationally protected cultural property". That addition would reflect a provision that appeared in such instruments as Additional Protocol I and represented a widely accepted principle. In paragraph (r) concerning attacks on buildings and personnel allowed to use the distinctive emblems provided for under the Geneva Conventions, it was proposed to add a reference to attacks against those carrying out activities to protect and assist the victims of a conflict in accordance with the Geneva Conventions. The reference was to articles 8, 9 and 10 of those Conventions. It was proposed that similar wording should be inserted in section D, paragraph (b).

82. He hoped that those amendments would meet with support, as their general purpose was to reflect the development of contemporary international law as embodied in the various conventions and additional protocols adopted within the framework of the activities of the Red Cross.

83. **Mr. DIOP** (Senegal) said that he basically agreed with paragraphs (b), (b *bis*), (c), (f), (g), and (p) of section B. His preferences with regard to other paragraphs were: (a), option 1; (a *bis*), option 1; (b), option 3, since he had difficulties with options 1 and 2 in relation to the question of military advantage; (c), option 1; (f), option 2; (g), option 2; (o), option 4; (p), option 1, subject to correction of the French version. He reserved his position on (p *bis*), since enforced pregnancy implied rape. He preferred option 2 of (t). In the latter context, he agreed that it was desirable to raise the limit age to 18 in accordance with the relevant International Labour Organisation Convention and the emerging consensus regarding the draft optional protocol to the Convention on the Rights of the Child.

84. **Ms. TOMIČ** (Slovenia) favoured option 2 of section B, paragraph (c), with the addition of a reference to safe areas declared by the United Nations. If the proposer of that option intended to withdraw it, she could accept option 1, plus a reference to United Nations safe areas.

85. With regard to paragraph (o), she preferred option 3, for the reasons stated by the Australian delegation and with regard to (r) she supported the amendment proposed by Spain. On paragraph (t), she preferred option 3, but, if it would be easier to reach agreement on option 2, she could concur provided that the word "actively" was deleted. The limit age should be 18 and not 15, in line with the growing agreement regarding the minimum age for criminal responsibility under the Statute.

86. **Mr. RAMA RAO** (India) said that it was of critical importance that war crimes should be defined if the Court were to be established, though the list of such crimes might be condensed. He would state his preferences regarding the various options under section B in the working group and would be flexible on matters of a controversial nature. The maximum protection should be given to women and children under international humanitarian law.

87. With regard to paragraph (o) of section B, he was in general agreement with the principle that new customary law could not be created by the Conference.

88. He noted the cogent remarks of Denmark and Sweden regarding the inclusion of nuclear weapons, which coincided with the position of the Non-Aligned Movement. The best way of including nuclear weapons would be under option 1 of (o), in accordance with the opinion of the International Court of Justice that initiation of the use of nuclear weapons was prohibited under customary international law. He would join in a consensus on the subject.

89. **Mr. TOMKA** (Slovakia) said that, although several delegations had stated that the Conference's task did not include the progressive development of international law, it had been convened under Article 13 (1) of the Charter, which provided for the progressive development of international law and its codification. The Conference should not develop the law of the Hague or Geneva Conventions but it would be a mistake to prevent it from establishing the international liability of persons committing serious crimes which would be prohibited in the future. The previous practice of other tribunals confirmed that several acts, though not specifically prohibited, were qualified as prohibited under customary international law. The principle *nullum crimen sine lege* should therefore be interpreted to mean that acts prohibited by customary international law were also punishable and that the Court should be able to hold offenders internationally responsible, under future treaties, for example.

90. With regard to paragraph (o) of section B, it was clear that option 1 would not find a consensus since it would not permit holding persons internationally liable for using weapons or systems that later became the subject of a comprehensive prohibition under customary or conventional international law. Though his delegation preferred option 3, he believed that option 2 could provide the basis for a compromise in further negotiations under the chairmanship of the Coordinator.

91. **Mr. SALINAS** (Chile) said that section A should refer not only to the Geneva Conventions but also to the Additional Protocols of 1977.

92. With regard to section B, his preferences were as follows: (b), option 1; (b *bis*) should be deleted, as the question was covered elsewhere; (c), option 1; (f), option 1; on (g), he preferred option 2, since it referred to attacks against buildings dedicated to education; on (o), he preferred option 4, including nuclear weapons, anti-personnel mines and blinding laser weapons. Since a ban on such weapons was one of the most important items of progress under international law, the Statute should explicitly mention them. Chile would not favour a comprehensive treaty banning such weapons unless the broadest possible consensus could be achieved. Though he preferred option 4, he could accept option 3, which would make it easier to achieve consensus. Option 2 was unacceptable, as it left out certain weapons and mentioned customary and conventional law. On paragraph (p), he preferred option 1 and, on paragraph (t), he would accept option 2. However, his preference with the regard to the limit age was 18, in the light of the Convention on the Rights of the Child and other instruments.

93. **Ms. TASNEEM** (Bangladesh) voiced her strong support for option 4 of paragraph (o) in section B.

94. **Mr. de KLERK** (South Africa) drew attention to matters of concern to his delegation and to some extent to the Southern African Development Community.

95. The list of crimes in the Statute should reflect not only the Geneva Conventions but also the Additional Protocols.

96. Nuclear weapons and other weapons causing indiscriminate injury or suffering should be included. He therefore preferred option 4 of paragraph (o) in section B, particularly as it was an open-ended provision.

97. The use of children in armed conflicts should be criminalized, and he supported option 2 of paragraph (t). He preferred option 2 of paragraph (p), which covered the crime of apartheid.

98. **Mr. ABDELLA AL HAMEDI** (Iraq) said that his positions on the options under section B were flexible, except that he preferred option 4 of paragraph (o); he suggested that the words "weapons that contain enriched uranium" should be added.

99. **The CHAIRMAN** invited the Committee to take up sections C and D.

100. **Mr. van der WIND** (Netherlands), acting as Coordinator of Part 2, noted that there was much overlapping between sections B and D. One question that might need further discussion was whether or not to include the four additional elements proposed in "OPTION II" for section D.

101. **Mr. FADL** (Sudan) opposed the inclusion under section D of crimes dealt with under the four Geneva Conventions and Additional Protocols I and II, as that involved a double standard that might imperil the unity and territorial integrity of States, undermine measures adopted by States to establish peace in non-international conflicts, and hamper efforts towards amnesty and national or domestic reconciliation. If the Court were to deal with war crimes in non-international conflicts, the competence of the State would be set aside. Furthermore, the Prosecutor should not have ex officio powers to conduct investigations in States without the prior consent of those States.

102. Section D was based on Additional Protocol II to the Geneva Conventions, but the provision in that Protocol that it could not be invoked in relation to the State's need to keep the peace internally or to justify interference in the internal or external affairs of a State had been neglected. Common article 3 of the 1949 Geneva Conventions had widespread international acceptance and, together with other conventions dealing with armed conflict, was sufficient to meet his concerns. Indeed, the International Court of Justice had stated with regard to a case involving Nicaragua that common article 3 of the Geneva Conventions was applicable to both international and non-international armed conflicts.

103. His proposal was all the more valid since Additional Protocol II dealt with internal conflicts between Governments and armed groups but failed to refer to conflicts among or between armed groups themselves.

104. **Mr. JENNINGS** (Australia) said that it was important to give the Court meaningful jurisdiction in non-international conflicts and broadly supported sections C and D. He would comment on individual paragraphs in a more informal setting.

105. In the section entitled "Elsewhere in the Statute", he preferred option 3. Since adequate provision for thresholds was already present in the preamble, the inclusion of a threshold provision under option 1 or 2 might have the effect of letting crimes that failed to satisfy so-called plan, policy or large-scale commission tests go unpunished. No such provision should appear in the war crimes article.

106. **Mr. DIAZ PANIAGUA** (Costa Rica) said he thought that a single definition of crimes should be applicable to both non-international and international conflicts, but recognized that the present structure of the draft would facilitate agreement. Secondly, it was important to include intentional starvation of civilians as a crime.

107. **Ms. ÜNEL** (Turkey) opposed the inclusion of sections C and D and said that it was not clear how the Court would decide whether there was an internal conflict or not. Depending on the development of discussions, she would have some proposals concerning the *chapeau* and on the question of the threshold dealt with under the heading "Elsewhere in the Statute", in which context she would prefer option 2.

108. **Mr. PIRAGOFF** (Canada) said that his delegation was committed to the inclusion of sections C and D.

109. **Mr. DIVE** (Belgium) fully supported the Canadian position, and wished to stress the importance of the proposed article Y, to protect the conventional provisions by which States were bound elsewhere.

110. **Ms. WONG** (New Zealand) endorsed the remarks of Australia and Canada with regard to sections C and D. There should be no threshold provision.

111. **Mr. JANDA** (Czech Republic) associated himself with the statements by Australia and Canada and thought there should be no threshold provision.

112. **Ms. O'DONOGHUE** (Ireland) said that her delegation was strongly committed to giving the Court jurisdiction over war crimes committed during internal armed conflicts and also opposed a threshold provision.

113. **Mr. Seung-hoh CHOI** (Republic of Korea) supported the inclusion of sections C and D. In the part entitled "Elsewhere in the Statute", he preferred option 2. Article Y should be included in some form.

114. **Mr. VERGNE SABOIA** (Brazil) advocated the retention of sections C and D. His view on the individual options of those sections was similar to that which he had expressed on section B. His initial preference with regard to thresholds was for option 2, but he was flexible on that point. He supported article Y.

115. **Mr. RAMA RAO** (India) said that there could not be a homogeneous structure of treatment of international and non-international armed conflicts so long as sovereign States existed. He therefore did not favour the retention of either section C or D. However, the *chapeau* to "OPTION I" would be necessary. He did not agree that the presence of a general threshold provision made it unnecessary to include a similar provision later in the Statute. Several other conditionalities had been discussed with regard to the specifics of crimes under article 5. The *chapeau* was logically justifiable and he supported the provisions in the section "Elsewhere in the Statute", and specifically in option 1. He would be ready to participate in negotiations on those points.

116. **Mr. MATSUDA** (Japan) supported option 1 of the section "Elsewhere in the Statute", but was ready to consult with delegations that preferred other options.

117. **Ms. WILMSHURST** (United Kingdom) strongly favoured the inclusion of sections C and D.

118. Regarding the section "Elsewhere in the Statute", her previous preference had been for option 1, but she could accept option 2, which she believed would meet the objections of those who did not favour the inclusion of a threshold, since what it contained was merely a guideline; it could perhaps be regarded as a compromise.

119. Ms. KOLSHUS (Norway) wished to place on record her support for the inclusion of sections C and D and favoured option 2 in the section "Elsewhere in the Statute".

120. Mr. QU Wencheng (China) supported the deletion of sections C and D and preferred option 1 in the section "Elsewhere in the Statute".

The meeting rose at 1.10 p.m.

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COMMITTEE OF THE WHOLE

SUMMARY RECORD OF THE 6th MEETING

Held at the Headquarters of the Food and Agriculture Organization of the United Nations
on Thursday, 18 June 1998, at 3 p.m.

Chairman: Mr. P. KIRSCH (Canada)
later: Ms. FERNANDEZ de GURMENDI (Argentina) (Vice-Chairman)

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The meeting was called to order at 3.25 p.m.

DESIGNATION OF COORDINATORS

1. **The CHAIRMAN** announced the list of Coordinators for the various sections of the Statute: preamble: Mr. Slade (Samoa); Part 1: Mr. Rama Rao (India); Part 2: war crimes: Mr. van Hebel (Netherlands); crimes against humanity: Mr. Sadi (Jordan); aggression and other crimes: Mr. Manongi (United Republic of Tanzania); jurisdiction: Mr. Kourula (Finland); admissibility: Mr. Holmes (Canada); Part 3: Mr. Saland (Sweden); Part 4: Mr. Rwelamira (South Africa); Parts 5 and 6: Ms. Fernández de Gurmendi (Argentina); Part 7: Mr. Fife (Norway); Part 8: Ms. Fernández de Gurmendi (Argentina); Part 9: Mr. Mochochoko (Lesotho); Part 10: Ms. Warlow (United Statesof America); Parts 11 and 12: Mr. Rama Rao (India); final clauses: Mr. Slade (Samoa).

2. The list was not exhaustive and could be supplemented in consultation with the Bureau.

CONSIDERATION OF THE QUESTION CONCERNING THE FINALIZATION AND ADOPTION OF A CONVENTION ON THE ESTABLISHMENT OF AN INTERNATIONAL CRIMINAL COURT IN ACCORDANCE WITH GENERAL ASSEMBLY RESOLUTIONS 51/207 OF 17 DECEMBER 1996 AND 52/160 OF 15 DECEMBER 1997 (*continued*) (A/CONF.183/2/Add.1; A/CONF.183/C.1/L.1 and L.4)

Part 1 of the draft Statute (continued)

3. **The CHAIRMAN** asked for a report on the informal consultations that had taken place.

4. **Ms. WILMSHURST** (United Kingdom) said that two substantive problems had been considered with regard to article 1 of the draft Statute (A/CONF.183/2/Add.1). Many delegations thought that the term "the most serious crimes of international concern" was too vague, and it was proposed that the words "as referred to in this Statute" be added after the words "for the most serious crimes of international concern".

5. It was agreed that article 1 could be sent to the Drafting Committee on the understanding that the use of the word "persons" would be reconsidered in the Committee of the Whole in the light of any agreement reached with regard to article 23. It was thought that other remarks made about article 1 could be dealt with in the Drafting Committee.

6. A number of suggestions had been made with regard to article 3, paragraph 3. It had been pointed out that the reference to powers and functions of the Court was rather wide and it was suggested that that term should be linked to other provisions of the Statute by adding the words "as provided in this Statute" after the words "powers and function". Some representatives thought the paragraph should not appear in article 3. Since others were still undecided as to its placement, it was proposed that the question should be referred to the Drafting Committee. It was asked whether the word "powers" in paragraph 3 of article 3 was necessary, and it was suggested that the Drafting Committee should be requested to consider that question, without prejudice to further consideration by the Committee of the Whole.

7. Assuming agreement on those amendments to article 1 and paragraph 3 of article 3 and on the suggested recommendations to the Drafting Committee, she proposed that the whole of Part 1 be sent to the Drafting Committee.

8. **Mr. GÜNEY** (Turkey) asked to see the proposed amendments in writing before taking a decision.

9. **Mr. SADI** (Jordan) said that the words "by special agreement" in article 3, paragraph 3, gave him some concern. The underlying intention should be spelt out clearly.

10. **Mr. CHUKRI** (Syrian Arab Republic) drew the Committee's attention to a discrepancy in the wording of article 1. The Arabic phrase used to translate the English phrase "to bring persons to justice" meant to present persons to court. He was not sure whether that was a drafting problem or a matter of substance.

11. **Mr. HAMDAN** (Lebanon) shared the concerns expressed by the representative of Jordan, and asked whether the question of article 3, paragraph 3, could be settled by the Drafting Committee. That point might have important implications for the paragraph as a whole.

12. **The CHAIRMAN** suggested that the amendments be put in writing for comments by interested delegations and for subsequent referral to the Drafting Committee.

13. *It was so agreed.*

Part 2 of the draft Statute (*continued*)

Article 5 (*continued*)

14. **The CHAIRMAN** said that the Committee would now consider the provisions on aggression and other crimes.

15. **Mr. VAN DER WIND** (Netherlands), acting as Coordinator, said that the crime of aggression had been discussed in the Preparatory Committee, initially on the basis of the definition included in the Nuremberg Charter and of the definition included in General Assembly resolution 3314 (XXIX). During those discussions, it had become clear that neither of the precedents was considered acceptable or appropriate for full inclusion.

16. The relevant section of the draft Statute contained three options. Option 1 was an attempt to combine elements of the Nuremberg precedent and the resolution 3314 precedent. However, option 3 was later considered to have taken over the role of option 1, though a number of delegations were still in favour of the option 2 approach, in which acts which might constitute aggression were also enumerated.

17. Whatever the option selected, two elements deserved further consideration by the Committee of the Whole, namely, whether determination of aggression by the Security Council should be a prerequisite for action by the Court, and whether occupation or annexation was also an essential element.

18. Regarding treaty crimes, namely, drug trafficking, terrorism and attacks on United Nations and associated personnel, the major question was whether any of them should be included. He suggested that the Committee might first focus on the question of whether there was sufficient support for their inclusion and, if that were the case, consider the question of definition.

19. **Mr. WESTDICKENBERG** (Germany) said that his country maintained its strong support for inclusion of the crime of aggression in the Statute. His general approach to that issue was set forth in an informal discussion paper available to delegations.

20. In the light of the deliberations at the most recent Preparatory Committee session, consultations and statements in the plenary, he believed that a workable and precise definition of the crime of aggression could be found. During the Preparatory Committee deliberations, two basic approaches had been taken. Some delegations had favoured a definition based on General Assembly resolution 3314 (XXIX) of 1974, which contained an exhaustive enumeration of acts constituting aggression. The debates and consultations during the work of the Preparatory Committee had also led to the formulation of a definition supported by a large number of delegations which was currently contained in option 3. As a compromise, that option mentioned the most important cases of the use of armed force that constituted crimes of aggression, in particular, armed attacks undertaken in violation of the Charter, which had the objective of, or resulted in, the military occupation or annexation of the territory of another State or part thereof.

21. That option should be preferred because it was necessary to limit the crime to undeniable cases of armed attacks committed in violation of the Charter that were of such magnitude as to warrant individual criminal responsibility.

22. The definition must not lend itself to frivolous accusations of a political nature against the leadership of a Member State. Also, the definition must not negatively affect the legitimate use of armed force in conformity with the Charter, the necessity of which could not be ruled out in the future. Furthermore, the definition contained in option 3 was in line with historic precedents such as the Charter of the Nuremberg Military Tribunal. It also met the strict standard of legal precision, clarity and certainty that was necessary for a norm providing for individual criminal responsibility. The broad and enumerative approach of General Assembly resolution 3314 (XXIX) would not command general agreement.

23. It was also necessary to address the role of the Security Council, in which context it was clear that the Statute of the International Criminal Court (ICC) could not redraft the United Nations Charter and that the primary responsibility of the Security Council for the maintenance of international peace and security had to be taken into account. By virtue of Chapter VII of the Charter, it was the Security Council's task to determine whether a given State had committed an act of aggression or not. Any attempt to circumvent the responsibilities of the Security Council would run counter to the Charter of the United Nations and would make it impossible for many States—including Germany—to continue to favour the inclusion of the crime of aggression in the Statute. The result might be that the crime of aggression would not be included in the Statute at all.

24. On the other hand, acknowledgement of the role of the Security Council would not and must not endanger the independence of the Court in determining individual criminal responsibility. Accordingly, delegations should decide whether they favoured the inclusion of a workable and realistic definition of the crime of aggression in the Statute of the ICC, taking into account the powers and responsibilities of the Security Council under the United Nations Charter.

25. **Mr. CHUKRI** (Syrian Arab Republic) said that the Statute should not cover terrorism, drug trafficking, and attacks on United Nations personnel. Terrorism was not well defined, and to include it would cause confusion. Drug trafficking and crimes concerning drugs should be dealt with by national courts. Attacks on United Nations officials should not be a matter for an international court.

26. Without having seen the text prepared by Germany and reading the alternatives presented in the draft Statute, he pointed out that there was a great difference between determining the occurrence of aggression, which was a political act and a prerogative of the Security Council under Article 39 and other articles of Chapter VII, and formulating a definition of aggression, which was a purely legal matter. There were two widely circulated definitions of aggression: that of the Nuremberg Tribunal, and that of resolution 3314 (XXIX) of 1974. His

delegation favoured the definition included in General Assembly resolution 3314 which represented the accumulated work of years.

27. A clear-cut distinction should be drawn between aggressors and freedom fighters. General Assembly resolution 3314 (XXIX), after enumerating acts of aggression, excluded freedom fighters acting in accordance with their right to national self-determination from being labelled as aggressors. No such provision was found in any of the alternatives or options presented to the Committee. His delegation would read the German proposal and would be flexible but preferred to take resolution 3314 of 1974 as a starting point for defining aggression. He reserved the right of his delegation to speak to that point later.

28. **Mr. NYASULU** (Malawi) supported option 3. While there was no doubt that the Charter empowered the Security Council to determine the occurrence of aggression, it might be argued that the International Criminal Court might proceed even in the absence of determination by the Security Council. That was the position that Malawi had always espoused. However, it had become clear that some countries would accept the inclusion of aggression as a crime only if there were a role for the Security Council.

29. Inside paragraph 1 of option 3, the brackets might have to be deleted, though that might not allay the fears of many States, particularly on the independence of the Court, considering that the Security Council's determination would be political in nature. It might therefore be useful to consider reversing the obligation: instead of subjecting the definition to determination by the Security Council, the obligation should be on the Court to seek such determination.

30. Option 3 might therefore have a third paragraph to read as follows: "The Court may seek a determination of the Security Council before proceeding on a charge concerning the crime of aggression." It might also be useful to leave no doubt about the competence of the Security Council under the Charter on matters concerning aggression. Perhaps a clause could be inserted as a fourth paragraph, to read as follows: "The definition of aggression under the present Statute is without prejudice to the powers and functions of the Security Council under the Charter of the United Nations."

31. A contravention of the Charter, as mentioned in the last part of paragraph 1, need not be qualified by the word "manifest". He would favour deleting the brackets around paragraph 1. Military occupation or annexation was not a condition for aggression to be manifest and for individuals concerned to be found responsible.

32. **Mr. STIGEN** (Norway) said that the crimes of terrorism, crimes against United Nations personnel, narcotic drugs trafficking or similar crimes not covered by the so-called core crimes were undoubtedly of international concern. However, in view of very serious and valid concerns—for instance, those of Thailand on narcotic drugs trafficking—a revision clause should be included to provide for amending the list in the future.

33. He appreciated the efforts of the German delegation to find a viable compromise on the crime of aggression, which was indeed of major concern, but he doubted whether it would be possible to find a satisfactory definition that would be consensually based, in view of the remarks of delegations that had just spoken, for whom he had high regard.

34. Apart from the issue of definition, there was the question of the Security Council, and he was not persuaded that a consensus on that issue was possible at the current stage, though he would be happy to see any basis for consensus evolving in the course of the discussion.

35. **Ms. TOMIČ** (Slovenia) said that her delegation strongly favoured the inclusion of the crime of aggression within the Court's jurisdiction and that it would be an unacceptable backward step if agreement could not be reached on that point. Aggression, being essentially a crime against peace, was usually accompanied by the commission of other serious violations of international humanitarian and human rights law. However, in many cases it would prove difficult to trace the commission of the latter crimes directly to the responsible persons in high positions, while the crime of aggression was easily attributable to those persons. Those were compelling reasons for adding a provision on the determination of individual criminal responsibility for aggression in the Statute of the Court. Such a provision should be appropriately brought in line with other provisions of the Statute regarding the role of the Security Council.

36. The definition of the crime of aggression should be precise, clear and preferably short, for which reasons she preferred option 3, which covered the relevant acts in a generic manner. However, it would also be necessary to consider the matter in relation with article 23, paragraph 7 (b).

37. **Mr. TOMKA** (Slovakia) said that treaty crimes were definitely of international concern, but nevertheless different in nature from the core crimes. His country was a party to a number of conventions concerning treaty crimes, but he nevertheless considered that they should not be included in the Statute.

38. His delegation strongly supported the inclusion of the crime of aggression in the Statute and thought it would be a serious mistake not to include it.

39. He agreed with the representative of Germany that option 3 represented the best option concerning definition. Nevertheless, he had some doubts whether the precondition for trying persons for committing the crime of aggression should be a determination by the Security Council. He understood the primary role of the Security Council in respect of Article 39 of the Charter, but thought that such determination was a precondition for taking action which was binding upon Member States; it would be difficult to imagine that such a precondition was necessary for the International Criminal Court.

40. Aggression was an objective category and it should be for the Court to determine whether an act of aggression had been committed or not. On the other hand, he accepted some linkage or relationship between the Security Council and the Court and would support the view that the Security Council had the power to determine that certain acts, although considered *prima facie* as aggression, did not in fact constitute acts of aggression. That was also in line with the role of the Security Council as envisaged in other parts of the Statute.

41. **Mr. MAHMOOD** (Pakistan) agreed that the Statute should include the most heinous crimes of international concern but opposed the inclusion of aggression because of its controversial nature. The definition of aggression which had been adopted by the General Assembly in 1974 was considered by many States, including Pakistan, as being of a non-binding nature, and more political than legal. Regarding a role for the Security Council in the matter, any such role would introduce a political element which would undermine the trigger mechanism, and would also run counter to the basic philosophy of complementarity devised to preserve the jurisdiction of national legal systems.

42. Furthermore, aggression was traditionally considered a crime committed by States, whereas Pakistan favoured the principle that the Court's jurisdiction should be limited only to crimes committed by individuals. That raised the complex problem as to how an individual might be prosecuted and punished for aggression, unless the Security Council first determined the existence of aggression, and that then those responsible were identified. In most cases those in authority would be the accused, something which threatened the concept of sovereignty of States.

43. If crimes of terrorism were to be included, selective definitions of terrorism would not be acceptable, and terrorism would have to be considered in all its forms and manifestations.

44. There were already a large number of treaties related to illicit traffic in narcotic drugs and psychotropic substances. Furthermore, States had enacted legislation to implement those treaties and had assumed jurisdiction over such offences. Consequently, the Court's jurisdiction would apply only if States parties to the ICC Statute had expressly consented to the Court's jurisdiction over such crimes.

45. **Mr. NATHAN** (Israel) was aware that the crime of aggression was of paramount concern to the international community, but was not convinced that it should be included in the jurisdiction of the International Criminal Court. The Statute of the ICC provided for penal sanctions against criminal acts or omissions and had to be based on precise and universally accepted definitions. Such a definition of the crime of aggression had not so far been forthcoming, and its absence might lead to the introduction of politically motivated definitions which might affect the independence and non-political character of the Court.

46. Option 1 followed largely the Nuremberg definition of crimes against peace, and option 2 that of General Assembly resolution 3314 (XXIX). However, no enumeration of acts of aggression would be exhaustive, and thus a large number of acts which would qualify as acts of aggression within the meaning of the resolution would not be included in the definition.

47. The third definition contained in the draft bore witness to the danger of politicization. Its object was obviously to single out as an act of aggression an armed attack aimed at establishing a military occupation, assuming acts of aggression to be irrelevant.

48. Acts of aggression were committed by States against States and did not belong to the category of offences committed by individuals in violation of international humanitarian law, which was what the Statute was intended to deal with.

49. While upholding his objection to the inclusion of the crime of aggression within the Statute of the Court, he said that, if it should be decided to include it, the exercise of jurisdiction should be subject to determination by the Security Council that an act of aggression had occurred. However, such determination by the Security Council would adversely affect the major defences available to the accused before the International Criminal Court, and might also affect the standing of the Court as an independent judicial organ.

50. The inclusion of aggression within the jurisdiction of the Court might be left for a future review conference, by which time a definition acceptable to the major part of the international community might have been developed.

51. The crime of terrorism was regarded as an international crime in keeping with the General Assembly Declaration on Measures to Eliminate International Terrorism. His delegation considered that the Conference should strike a correct balance between recognizing terrorism as an international crime, and focusing on the most practical and effective means of cooperation in bringing international terrorists to justice.

52. **Mr. CHERQUAOUI** (Morocco) agreed with the Syrian delegation that illicit traffic in narcotics, crimes against United Nations personnel and terrorism should not fall within the jurisdiction of the Court.

53. Given the difficulty of finding a precise definition of the crime of aggression and the role of the Security Council, he thought that aggression should be excluded from the list of crimes falling within the

competence of the Court. However, if there were to be a consensus for its inclusion, the Syrian proposal should be considered, and an attempt made to find a definition of aggression that was consistent with General Assembly resolution 3314 (XXIX) of 1974.

54. **Mr. ABDELLA AL HAMEDI** (Iraq) said that his delegation would prefer the crime of aggression to be within the jurisdiction of the Court, taking into account General Assembly resolution 3314 (XXIX) of 1974. Because of the lack of any other definition of the crime of aggression, the General Assembly text should be the basis of any subsequent definition. His delegation favoured option 2.

55. His delegation was opposed to including terrorism and crimes committed against United Nations personnel, as well as crimes relating to illicit traffic in narcotics, in the Court's jurisdiction.

56. **Mr. MATSUDA** (Japan) supported the inclusion of aggression in the Statute. In his view, option 3, which was a generic approach that had emerged from discussion in the Preparatory Committee, could form the basis for the final text. At the same time, the constituent elements of aggression must be defined as clearly and precisely as possible.

57. Paragraph 1 of option 3 could be improved by making it clear that soldiers of low rank could not be held guilty of aggression. The words "as a leader or organizer" could be added after "an individual who is in a position of exercising control or capable of directing the political and military action of the State".

58. If the Court were to exercise jurisdiction over the crime of aggression, determination by the Security Council of the existence of the act of aggression must be required. He therefore suggested that the square brackets in the first and second lines of paragraph 1 be removed.

59. While he agreed that treaty-based crimes were of international concern, he thought that it was not necessary to include them in the Statute. A framework of cooperation had already been established for the prosecution and punishment of those crimes.

60. **Mr. KOFFI** (Côte d'Ivoire) said that his delegation would favour inclusion of the crime of aggression in the Statute if there was a sufficient majority in support of that. On that assumption, he urged that the square brackets be deleted and the text be forwarded to the Drafting Committee. His delegation strongly urged the inclusion of crimes against United Nations and associated personnel within the competence of the Court.

61. It would be premature to include illicit traffic in narcotics in the Statute at the current stage, but the other provisions on treaty crimes could be forwarded to the Drafting Committee.

62. Including acts of aggression within the jurisdiction of the Court would not conflict with the prerogatives of the Security Council under Chapter VII of the Charter, and questions of aggression could be brought before the Court by the Council. His delegation was flexible as to the definition of aggression, which should be based either on General Assembly resolution 3314 (XXIX), or on option 3, which might provide a compromise approach.

63. **Mr. DIVE** (Belgium) asked what would be the logic in prosecuting war crimes if the first crime that opened all armed conflict—that is, the crime of aggression—were not prosecuted. Belgium had always strongly supported the inclusion of the crime of aggression in the Statute of the Court. For that reason, he supported option 3, presented earlier by the German delegation.

64. He accepted the specific role of the Security Council, but did not see the need to require that there be occupation or annexation before it could be considered that aggression had taken place, precisely because of the prior role of the Security Council.

65. There were no universally accepted bases for including terrorism, crimes against the safety of United Nations personnel, and traffic in narcotics. He would therefore be in favour of including a revision clause to cover those points, as suggested by the Norwegian delegation.

66. **Mr. DHANBRI** (Tunisia) said that his delegation supported the inclusion of the crime of terrorism, which was becoming more and more of a transnational crime. He did not object to inclusion of the crime of attacks against United Nations personnel and installations.

67. His delegation was in favour of including the crime of aggression within the jurisdiction of the Court and preferred option 2. He did not see the need to establish a link between the Security Council and the competence of the Court with respect to aggression. The Security Council was empowered under Chapter VII of the Charter to determine the occurrence of aggression, but it had a political role and no jurisdictional power.

68. **Ms. DASKALOPOULOU-LIVADA** (Greece) said that discussion in the Preparatory Committee and in the plenary of the Conference had revealed a marked increase in the number of States which would like to see the crime of aggression included within the jurisdiction of the Court. Indeed, it would be illogical to ignore aggression and concentrate only on its by-products—war crimes, crimes against humanity and genocide.

69. Greece had consistently maintained that aggression must fall within the jurisdiction of the ICC and had expressed its readiness to work for the formulation of a definition. Of the three options that appeared in the draft, her delegation would prefer either option 1 or option 3. Option 3 was applicable not only in the case of military occupation, but also in cases where the objective was to establish military occupation. She could consequently accept it as a compromise. Although there was a clear linkage between aggression and the role of the Security Council, that linkage did not affect the definition of the crime, and she did not wish to address the question at the current stage.

70. Her delegation was not in favour of retaining the crimes of terrorism, drug trafficking or other treaty crimes in the Statute, because the jurisdiction of the Court should, at least at the first stage, be restricted to the so-called core crimes. Otherwise, it might be necessary to introduce the notion of non-inherent jurisdiction, which would lead to a distinction between two types of crimes.

71. **Mr. SADI** (Jordan) supported the inclusion of aggression, if a proper legal framework could be worked out. On option 3, the distinction between initiating aggression and carrying it out, as referred to in subparagraphs (a) and (b) of paragraph 1, was not clear. The relationship between the individual mentioned in paragraph 1 and the "State" referred to in the line immediately following subparagraph (b) might also need to be indicated more clearly.

72. Option 3 spoke of aggression undertaken in contravention of the Charter, which could be read as suggesting that there might be aggression conducted in conformity with the Charter. He was sure that that was not the intention. Those points should be clarified.

73. **Ms. CHATOOR** (Trinidad and Tobago), speaking on behalf of the member States of the Caribbean Community (CARICOM), said that they could support the inclusion of aggression within the jurisdiction of the

Court, provided that there was an acceptable definition. They considered that option 3 was a working basis for arriving at a definition.

74. In the plenary, the head of the Trinidad and Tobago delegation had stressed that the illicit traffic in narcotic drugs was of particular concern to his country. On behalf of CARICOM, he had urged the Conference to give very serious consideration to the inclusion of that crime within the jurisdiction of the Court.

75. She did not object to the inclusion of the two other treaty crimes within the jurisdiction of the Court.

76. **Mr. Tae-hyun CHOI** (Republic of Korea) strongly supported the inclusion of aggression in the Statute and the adoption of a definition constituting a compromise between the generic and enumerative approaches, namely option 3, proposed by the German delegation. However, in the first paragraph of option 3, his delegation preferred the deletion of the phrase within square brackets dealing with the role of the Security Council.

77. His delegation did not oppose the inclusion of the crime of terrorism in the Statute but would prefer that the inclusion of the two other treaty crimes should be considered later.

78. **Ms. SHAHEN** (Libyan Arab Jamahiriya) said that her delegation strongly supported the inclusion of the crime of aggression in the jurisdiction of the ICC, and that the lack of a definition of aggression in a treaty context should not prevent its inclusion, because the international community was still endeavouring to codify all international crimes, including aggression.

79. She did not consider that the Security Council should refer cases. The Security Council had failed to deal with many cases of flagrant aggression—for instance, the attack on his country in 1986. General Assembly resolution 43/38 had declared that to be an act of aggression.

80. The Security Council and its decisions were influenced by the interests and positions of certain permanent Members, so that its resolutions were selective and followed a double standard. His delegation would object to the ICC's being paralysed if the Security Council could not decide whether or not there was aggression. He supported the remarks of Syria with regard to the definition of that crime, which should agree with General Assembly resolution 3314 (XXIX).

81. **Mr. DIAZ PANIAGUA** (Costa Rica) said that, in particular for the reasons adduced by Greece, the crime of aggression should be included in the Statute, but that the definition should be discussed in the context of article 10.

82. He supported the remarks of Trinidad and Tobago concerning drug trafficking, and also favoured the inclusion of terrorism and crimes against United Nations and associated personnel, although he noted the points made by the United Kingdom delegation at the previous meeting with regard to crimes against United Nations staff.

83. *Ms. Fernández de Gurmendi, Vice-Chairman, took the Chair.*

84. **Ms. FLORES** (Mexico) said that it would obviously be desirable for the ICC to have jurisdiction over aggression, but doubted whether the problems in that regard could be solved. She believed that the crime of aggression should comprise any armed attack carried out in violation of the United Nations Charter. The options in the consolidated text seemed too restrictive; if aggression were included, it would have to be the subject of a far more thorough debate.

85. An even greater problem was related to the link with the Security Council. If aggression were included, the Council would have to play some role, but she was not in favour of granting it an exclusive monopoly. The Court should have universal jurisdiction, and any aggressor should be punished. Granting an exclusive monopoly to the Security Council would open the door to the casting of a veto to give impunity to aggressors. A further problem was the impact on the Court's independence.

86. In view of those difficulties, it would be wise to exclude aggression from the Court's jurisdiction. At the current stage, the Conference should confine itself to the core crimes.

87. Ms. SUNDBERG (Sweden) said that, like the representatives of Norway and Germany, she would favour inclusion of aggression in the jurisdiction of the Court. It would be of great importance to maintain the distinct roles of the Court and the Security Council in that regard.

88. The ICC needed a clear and precise definition of what constituted a criminal act, and she favoured option 3. However, she supported the Norwegian suggestion that, if a consensus on defining aggression could not be reached within a reasonable time, its inclusion should be considered at a later stage, and a revision clause should be provided for.

89. She strongly supported the inclusion of crimes against United Nations and associated personnel, but did not support the inclusion of illicit drug trafficking or terrorism, since those crimes were prosecuted at the national level and multilateral cooperation already existed under relevant treaties. If implementation problems should occur, the two latter categories of crime could be considered for inclusion at a review conference.

90. Ms. DIOP (Senegal) agreed that terrorism, crimes against United Nations personnel and drug trafficking were important and serious, but thought that they should not be within the Court's jurisdiction.

91. She favoured including aggression and, in the light of the statement made by the German delegation, preferred option 3, though she had some reservations regarding drafting. Though the prerogatives of the Security Council could not be denied, a safety net was needed to ensure the independence of the Court and its decisions. Also, a way must be found to oblige the Security Council to discuss acts of aggression promptly, and it would also be necessary to deal with the veto question. The Court would need to be protected from political influence.

92. Mr. SKIBSTED (Denmark) said that his country had always strongly favoured the inclusion of aggression within the jurisdiction of the ICC. He agreed with the representatives of Germany and Greece that the Court's Statute would be highly incomplete without the inclusion of aggression.

93. In defining aggression, a balance must be struck between the Court's need to be unimpaired by political influence and the Security Council's responsibilities under the Charter. In his view, option 3 came closest to fulfilling those objectives and seemed to have the broadest support.

94. Even though treaty crimes were of international concern, the Conference should concentrate on the four core crimes. However, the door for additions to the list of crimes could be kept open by providing for an automatic review of the list of crimes by the Assembly of States Parties.

95. Ms. VINOGRADOVA (Ukraine) said that aggression and crimes against United Nations personnel should be included in the Court's jurisdiction. She supported the definition of aggression contained in option 3. The Court

should be allowed to determine whether there had been an act of aggression, and the role of the Security Council should not be decisive.

96. With regard to including such crimes as terrorism and traffic in narcotics, the ICC must be complementary to national systems. Assigning terrorism and traffic in narcotic drugs to the jurisdiction of the Court might overburden it with cases that could be successfully dealt with by national courts.

97. **Ms. BOREK** (United States of America) agreed with Norway and Mexico that including the crime of aggression raised the problem of definition and the problem of the role of the Security Council. She was sceptical as to whether the Conference would be able to adopt a satisfactory definition for the purpose of establishing criminal liability. General Assembly resolution 3314 (XXIX) did not attempt to define aggression as an individual crime and merely repeated a formula from the Nuremberg Charter.

98. The determination of aggression was a task conferred on the Security Council under the Charter. Only the Security Council could take the forceful measures that were necessary if aggression was to be addressed and remedied. That gave rise to political and other problems that had made it difficult to find consensus in the past; yet the Security Council had an essential role to play.

99. As had been said, inclusion of attacks on United Nations staff and installations would require the elaboration of a second regime. Including terrorism and drugs would distract and overburden the Court, without contributing to the successful control of such crimes.

100. As she had not spoken earlier on sections C and D of the provisions concerning war crimes, she wished to emphasize that it was essential to cover internal armed conflicts, which were the most frequent and the most cruel. That area of law had been developed and clearly established and must be included in the Statute.

101. **Ms. PIBALCHON** (Thailand) said that she supported what the representative of Trinidad and Tobago had said on the inclusion of the crime of illicit traffic in narcotic drugs and psychotropic substances. To empower the ICC to deal with drug crimes would give another chance to the international community to eradicate such crimes.
102. Her delegation favoured including aggression under the jurisdiction of the ICC. The Security Council should be given the power to refer cases to the ICC and should have the role of determining whether an act of aggression had occurred before the ICC adjudicated the case.

103. **Mr. PALIHAKKARA** (Sri Lanka) said that his delegation agreed with the representative of Thailand and supported the inclusion of crimes of terrorism and crimes related to illicit drug trafficking. His delegation believed that an inclusive approach would promote more broad-based support for the ICC Statute and the universality of its jurisdiction.

104. There were technical problems in the inclusion of such crimes in an inherent jurisdiction regime, but it was the task of the Conference to solve such problems. It would be incongruous for the ICC Statute to make no reference to terrorism and, for example, the use of nuclear weapons while referring to murder and the use of landmines as serious crimes of international concern. His delegation would participate constructively in any working group on that issue, in order to develop a consensus.

105. It would be unrealistic to ignore aggression, which was often the root cause of many other crimes and humanitarian abuses falling within the ICC's purview. As had been stated, the increasing support evident for the

inclusion of aggression showed the way forward. He had an open mind regarding the options and would help work towards a consensus.

106. **Mr. PANIN** (Russian Federation) said that the inclusion of aggression in the jurisdiction of the Court was of particular importance. Crimes against humanity were often committed as part of wars of aggression.

107. He thanked the German delegation for its efforts to develop a definition of aggression and supported the generic approach adopted. The role of the Security Council in the context of aggression was of decisive importance and its powers under the Charter should be fully reflected in the definition.

108. The decisions of an international body operating in accordance with an international treaty with respect to determining the existence of an act of aggression were binding and could not simply be disregarded. Two organs should not have overlapping powers in that area. For that reason also, he supported option 3 in the draft concerning the crime of aggression in document A/CONF.182/2/Add.1.

109. It would be premature to include illicit traffic in narcotic drugs or crimes against United Nations personnel in the jurisdiction of the Court. He also had doubts about the provisions on terrorism as they were now formulated, but could see some point in extending the jurisdiction of the Court to the most serious crimes of terrorism that were of concern to the entire international community, subject to a decision of the Security Council.

110. **Mr. KERMA** (Algeria) said that terrorism should be within the Court's jurisdiction. He agreed with the representative of Norway that it was a matter of great concern to the international community, as reflected in the large number of international instruments that had been prepared in order to deal with the various aspects of the phenomenon and in the efforts of States to explore other ways and means of strengthening their cooperation in order to end those acts.

111. With regard to illicit drug trafficking, the idea of creating the ICC had been revived as the result of a desire to bring the authors of those crimes to justice. Illicit drug trafficking should be included in the competence of the Court.

112. He agreed to the inclusion of aggression and endorsed the Syrian position that the definition in General Assembly resolution 3314 (XXIX) of 1974 was still valid.

113. **Mr. JANSONS** (Latvia) said that he strongly supported the inclusion of aggression in the Statute of the ICC and that option 3 represented the necessary compromise, avoiding excessive definition and interpretation, while preserving the necessary linkage between the jurisdiction of the ICC and that of the Security Council.

114. **Mr. ALABRUNE** (France) said that his delegation could accept the inclusion of the crime of aggression within the competence of the Court on two conditions. The first condition was that it should be possible to agree on a sufficiently precise and clear definition, in which context he concurred with many delegations in congratulating the German delegation on the efforts it had made. Option 3 was acceptable.

115. The second condition was also reflected in option 3: it must be made quite clear both in article 5 and in article 10 of the Statute that the Court could take up a case only if the Security Council had determined that an act of aggression had taken place. It would be in the interests of the Court itself to be able to rely on a prior determination by the Security Council, to avoid having to pass judgement not only on persons but also on States.

116. His delegation agreed with the view that terrorism and crimes involving illicit traffic in narcotic drugs were a matter of legitimate concern, but also that the Norwegian approach was the correct one.

117. **Ms. WILMSHURST** (United Kingdom) said that she did not support the inclusion of the three treaty-based crimes, but supported the inclusion of aggression, on two conditions. First, there should be an adequate definition, such as that in option 3. Second, there must be a proper link with the Security Council. She agreed with the German delegation that, if the Security Council role was not reflected, aggression should not be included in the Statute.

118. **Mr. AL AWADI** (United Arab Emirates) said that a convention had been signed the previous month by the members of the League of Arab States on action to combat terrorism, including a precise definition of the crime. If the Statute took into account the definitions in that convention, he would not oppose the inclusion of such crimes in the Statute of the ICC. It would, however, be premature to include illicit traffic in narcotic drugs and crimes against United Nations personnel.

119. Aggression should be included within the competence of the Court, taking as a basis the definition of aggression contained in General Assembly resolution 3314 (XXIX).

120. **Mr. RAMA RAO** (India) said that it was not premature to consider inclusion of the treaty crimes. In view of the recent Arab summit on terrorism and several international conventions on terrorism, he fully agreed that that crime should be included. He was open-minded on the inclusion of trafficking in drugs.

121. He was not opposed to the concept of a review conference, but that did not mean that the inclusion of terrorism in the Court's jurisdiction should be postponed.

122. His delegation had no objection to the inclusion of aggression. However, to superimpose the Security Council's role on that of the Court would politicize the Court. Some means must be found whereby aggression could be included without such politicization of the Court.

123. **Ms. WONG** (New Zealand) said that her delegation could support the inclusion of aggression if a definition could be agreed on. It must be borne in mind that the Security Council had primary responsibility for determining the existence of an act of aggression, though the Charter did not exclude the General Assembly's responsibility.

124. She supported the inclusion of terrorism and strongly believed that attacks on United Nations and associated personnel should also be included. As had been pointed out, the inclusion of a treaty-based crime would require the establishment of a special regime for treaty-based crimes. However, the Spanish proposal in document A/CONF.183/C.1/L.1 would avoid that problem by including the reference to attacks on United Nations personnel in the war crimes provisions.

125. **Mr. FADL** (Sudan) said that the Statute should include aggression and supported the view of the representative of Syria that General Assembly resolution 3314 (XXIX) of 1974 should form the basis for defining aggression. He would revert to discussion of the respective roles of the Court and the Security Council regarding determination of aggression when the Committee discussed article 10.

126. **Ms. SINJELA** (Zambia) supported the inclusion of aggression in the crimes under the jurisdiction of the Court. He agreed with those who had argued that it was a primary crime underlying war crimes and crimes against humanity.

127. **Mr. ASSHAIBANI** (Yemen) supported the inclusion of aggression in the Statute of the Court. His position on the inclusion of terrorism, crimes against United Nations personnel and illicit traffic in narcotic drugs was fully in accordance with that taken by the representative of the United Arab Emirates.

128. **Ms. MEKHEMAR** (Egypt) said that her delegation agreed to the inclusion of aggression in the Statute of the ICC. General Assembly resolution 3314 (XXIX) should be the basis for its definition, which was why she supported option 2. She was willing to study other wording, and possibly option 3.

129. **Mr. PHAM TRUONG GIANG** (Viet Nam) said that it would be unacceptable to his delegation for aggression not to be included in the Statute of the Court.

130. As far as the options were concerned, his delegation would support an option which was clear and precise and reflected the interests and position of a large number of States.

131. **Mr. HAMDAN** (Lebanon) said that his delegation also supported the inclusion of aggression, the definition of which should be based on General Assembly resolution 3314 (XXIX) of 1974. That resolution reflected the basic principles of the Charter, which were not taken into account in the various options before the Committee, including option 3, originally proposed by Germany. He had been in contact with the German delegation to express his concerns, and understood that the link between the Security Council and the Court with regard to aggression would be studied in the context of article 10. There should be cooperation between the Court and the Council, the Court judging individuals and the Council sanctioning States. The Council could be one of the Court's clients, as it were, but there must be total separation of the powers of the two bodies.

132. Consideration of the treaty crimes should be deferred.

133. **Mr. POLITI** (Italy) said that his delegation favoured the inclusion of aggression within the Court's jurisdiction, and supported a clear definition of the crime. His preference was for option 2, in which the general definition was accompanied by an enumeration of specific acts constituting aggression.

134. Opinions differed on the various options, and flexibility was necessary in order to find a definition that was acceptable to all. He welcomed the efforts made by Germany in producing option 3. There were still problems with that definition, but the proposal could serve as a working basis.

135. If a Security Council role in determining the existence of an act of aggression by a State was to be recognized in the ICC Statute, that role should be construed only as a procedural condition for the intervention of the Court. Furthermore, the independence of the Court in the determination of individual criminal responsibility should be fully preserved.

136. He shared the concerns that including treaty crimes might delay the establishment of the Court. At the same time, the Committee should favourably consider the possibility of including crimes against United Nations and associated personnel, and he supported what had been said by the New Zealand representative.

137. **Mr. RODRIGUEZ CEDEÑO** (Venezuela) said that treaty crimes could be included in the Statute without the need for separate regimes. However, the Court's jurisdiction need not be static: it could evolve with time, and it would not be necessary to introduce treaty crimes at the current stage. He supported the Norwegian proposal, but the Statute should permit the Assembly of States Parties to decide on the inclusion of such crimes.

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138. Aggression should be included within the competence of the Court, on condition that it was clearly defined, and the possible impact studied. The precedents referred to by other delegations should be used in that regard. Option 3 seemed to represent a good basis for negotiation, but it should be developed further. The autonomy of the Court was essential for its effectiveness, and it could not depend on a decision or lack of decision by a political body. A harmonious, balanced text must be found that would give the Court the necessary autonomy without ignoring the powers of the Security Council.

139. Mr. MADANI (Saudi Arabia) said that aggression should be covered in the Statute, taking account of General Assembly resolution 3314 (XXIX).

140. The convention recently signed by the members of the League of Arab States defined terrorism and could be referred to. His delegation agreed with others that drug trafficking and crimes against United Nations personnel should not be included.

141. Mr. PEIXOTO (Brazil) said that he still had serious doubts about the possibility of broad agreement on a definition of aggression as an individual crime and foresaw serious problems related to conflicts of competence between the Security Council and the ICC, which would affect the independence of the Court. His delegation therefore did not favour the inclusion of the crime of aggression in the Statute.

142. Treaty crimes should also not be under the jurisdiction of the Court.

143. Mr. GÜNEY (Turkey) said that his delegation had doubts about including aggression among the crimes to be considered by the Court. There was no generally accepted definition of aggression and no precedent concerning individual criminal responsibility for acts of aggression. The competent body for considering acts of aggression was the Security Council, which was concerned with actions of States, and it was difficult to see how an act imputable to a State could become imputable to an individual.

144. The suggestion made by the Mexican delegation might offer a solution, or the matter might be covered in a review clause, as mentioned by the delegation of Norway. But it would be necessary to see the contents of such a clause before any decision could be taken.

145. A number of conventions existed concerning various aspects of terrorism. One of the elements to which he attached importance was that States should refrain from organizing, encouraging or inciting acts of terrorism in the territories of other States or tolerate activities on their own territory aimed at the commission of such acts. According to the International Law Commission, systematic and prolonged terrorism was a crime with international repercussions. A systematic crime against a civilian population would come under draft article 25 of the Statute.

146. In many instances, terrorist activities were supported by drug trafficking, which fully justified the inclusion of terrorism and crimes related to trafficking in drugs and psychotropic substances in article 5.

147. Mr. ALEMU (Ethiopia) said that his delegation strongly supported the inclusion of the crime of aggression in the Statute. The ICC would have an effective mechanism for bringing individual perpetrators to justice. However, the power vested in the Security Council for determining whether aggression had occurred should not be disregarded. He preferred option 3.

148. Since treaty-based crimes concerned only States parties to treaties, his delegation did not favour their inclusion.

149. **Mr. SHARIAT BAGHERI** (Islamic Republic of Iran) said that his delegation firmly supported the inclusion of aggression within the jurisdiction of the Court. Failure to include that crime would jeopardize the existence of the Court. The Security Council had encountered many difficulties in defining, recognizing and punishing acts of aggression or the authors of such acts and the Conference was in the course of establishing an international body to try the most serious cases. As had been stated, without competence on aggression the Court would be more symbolic than effective. He thought that the definition contained in resolution 3314 (XXIX) of 1974 was satisfactory and was adequately reflected in option 2.

150. He agreed with many other delegations that the Statute should cover only the first four categories of crime listed at the beginning of article 5.

The meeting rose at 6.30 p.m.